83-2142

No.

Office - Supreme Court, U.S.
FILED
JUN 28 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1984

DAVID KAPLAN,

Petitioner,

-against-

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY: ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union)

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1 - Where a union has caused a grievance procedure to "malfunction" by "extracting" $150.00 as a "precondition" for processing a wrongful discharge grievance, may the circuit court defer to the district court by declining to consider that issue - solely - because it was not addressed or considered by the district court?

2 - Does this Court's "mandate" to the lower courts, as contained in Foman v. Davis, infra, compel that such lower courts evaluate a proposed amended complaint against - at least one of the factors enumerated therein?

3 - Before trial or any depositions, where neither the district court nor the circuit court had previously considered, addressed or adjudicated the merits of the union's demand and acceptance of the $150.00,

does res judicata apply to a proposed amended complaint which now seeks to allege that specific breach of the union's duty of fair representation - and the amendment was suggested by the circuit court's opinion?

4 - Does United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) allow a union to be held liable for its fair representation breach, without simultaneously proving an employer's violation of the collective bargaining agreement?

5 - Where St. John's University has discharged a law teacher for "bad character" and thereafter foreclosed him from obtaining a definite appointment as Assistant Professor of Law at another institution, is such law teacher entitled to a "name clearing" hearing?

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1 - The summary affirmance by the Court of Appeals denying leave to serve an amended complaint - an amendement suggested by the Circuit Court's own opinion - directly conflicts with the "mandate" issued by this Court in Foman v. Davis, 371 U.S. 178 (1962), as well as with the statutory spirit of Fed. R. Civ. P. 15(a) that amendments to pleadings be "freely granted."

2 - The rationale of the lower courts would vitiate Fed. R. Civ. P. 15(a) since every amendment of a pleading, at the pre-trial stage, which seeks to add an essential allegation would be considered res judicata, thus precluding having causes heard on their merits, and not on the technical aspects of pleadings.

3 - United Parcel Service, Inc., v. Mitchell, 451 U.S. 56, 101 S. Ct. 1559 (1981) very clearly held that a union can be held liable for its fair representation breach without the requisite proof of an employer's violation of the labor agreement, but both lower courts have not addressed the issue on whether or not the proposed amended complaint states a cause of action. (Neither the union nor the employer seriously challenge

the fact that the proposed amended complaint states a cause of action, rather, they assert that res judicata should be applied to the amended pleading.) The amendment of pleadings, particularly before trial, is an especially common practice, and review by this Court would have general application and broad consequences under a widely reoccurring civil procedure.

A - The Second Circuit in Steinman v. Spector Freight Systems, Inc., 476 F.2d 437 (2d Cir. 1973) has itself approved the bifurcated approach in these matters by allowing the employee to first proceed as against the union to establish the breach of the duty of fair representation. Hence, remand of this case to the lower court for a determination of whether the proposed amended complaint states a cause of action against the union would be appropriate.

4 - The recent decision of this Court in Bowen v. U.S. Postal Service, 103 S. Ct. 588 (1983) now places primary responsibility for lost wages on the union, and the proposed amended complaint very clearly states a cause of action against the union for breach of its duty of fair representation. (Vaca v. Sipes, 386 U.S. 171 (1967) was an action against the union only.) Hence, the decisions below were plainly in conflict with this Court's decision, and the deferral by the court of appeals to the district court in declining to consider the union's demand for $150.00 has resulted in an arbitrary and unreasonable determination and precluded the petitioner from having a clearly meritorious claim heard on the merits.

5 - The summary affirmance by the court of appeals is completely out of line with decisions of other circuits, and the Second Circuit Panel has sanctioned such a radical departure by the disrict court from such well defined and long established principles that review, and reversal, by this Court is required to maintain consistency between the circuits on the application of Fed. R. Civ. P. 15(a), as well as the further interpretation of the "mandate" to lower courts under Foman v. Davis, supra.

6 - The Second Circuit Panel has so drastically and dramatically digressed from its own well established decisions dealing with complaints in fair representation cases that review by this Court is essential to bring

about uniformity within the circuit court., e.g., O'Mara v. Erie Lackawanna R.R. Co., 407 F.2d 674 (2d Cir. 1969), aff'd sub nom. Czosek v. O'Mara, 397 U. S. 25 (1970).

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No.____

_____ * _____

IN THE

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October Term, 1984

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DAVID KAPLAN,

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- against -

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union)

Respondents.

_____ * _____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, David Kaplan ("Employee" or "Prof. Kaplan") respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit entered on April 13, 1984, which summarily affirmed an order of the U. S. District Court for the Eastern District of New York denying petitioner's motion to file an amended complaint pursuant to Federal Rules of Civil Procedure 15(a). (The district court applied res judicata to the proposed amended complaint despite the fact that the crucial allegations contained in the amended pleadings were neither considered nor addressed by

either the district court or the Second Circuit.)

OPINIONS BELOW

The summary opinion of the Second Circuit entered April 13, 1984, affirming the district court's denial of petitioner's motion to file an amended complaint has not been officially reported, and is reproduced in the Appendix to this petition at pages 1-3a. 1/ The district court's opinion denying petitioner's motion to file an amended complaint is reported in 574 F. Supp. 631 and is at 4a-12a of the Appendix. The summary opinion of the Second Circuit affirming the district court's grant of summary judgment to the employer and the union is reported in 722 F.2d 728 (2d Cir. 1983) and is at 13a-16a of the Appendix.

1/ Reference to materials in the Appendix is shown by inclusive page numbers suffixed by the letter "a", as: 1a-3a.

The order denying petitioner's petition for a rehearing en banc was entered March 18, 1983 and is at 17a-18a. The opinion of the district court granting the employer and the union summary judgment is reported at 547 F. Supp. 707 and is at 19a-36a. The district court's judgment entered on the order granting summary judgment is at 37a-38a.

JURISDICTION

The Second Circuit issued its summary order on April 13, 1984 (1a-3a), and this petition to this Court is filed within ninety (90) days of April 13, 1984. 2/

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §154(1)(1976).

2/ Petitioner by motion dated March 30, 1984 sought a transfer of oral argument to another panel of the Second Circuit because a majority of the panel was the same majority that had previously affirmed the grant of summary judgment to the employer-union. It was the petitioner's contention that having the same panel majority decide two successive appeals is perceived as unfair, but such a procedure is also conceptually flawed since it lacks any objective review of oversight that may been contained in the first summary opinion.

STATUTES INVOLVED

Federal Rule Civil Procedure 15(a) Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is permitted and the action has not been placed upon the trial calender, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Federal Rule Civil Procedure 8(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

29 U.S.C. §185(a). Suites for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor

organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE 3/

Prof. Kaplan began part-time college teaching in September 1959 and has been teaching part and full time for over 20 years. St. John's University has not disputed Prof. Kaplan's allegations that he was at least one of the most popular and competent teachers at the university. (86a). Prof. Kaplan is an attorney at law and was admitted to practice before this Court on May 1, 1961. From September 1976 to August 1982 he was Assistant Professor of Business Law at St. Vincent's

3/ This statement of the case is based on the allegations contained in the proposed amended complaint. There is no dispute that the union demanded money as a precondition for meeting with union counsel and the union grievance committee to discuss the employee's wrongful discharge grievance. Copies of 2 checks totalling $150.00 and endorsed by the union are annexed to the complaint. (102a-105a) These same checks were also annexed to Prof. Kaplan's affidavit opposing summary judgement, but they were not considered by either the district or the circuit court.

College, a unit of St. John's University, a private institution of higher learning in the County of Queens, City of New York. The labor organization is an independent union representing the full time teaching faculty at the university. Prof. Kaplan was a member of the collective bargaining unit. The labor agreement between the union and St. John's University contains neither a union nor an agency shop, and union dues at the time this action arose was $5.00 per year. The union - in its entire period of existence - has never appeared before an arbitrator, and hence the collective bargaining agreement has never been interpreted by an arbitrator. In October 1980 (Prof. Kaplan began his teaching at St. Vincent's College in September 1976) he was denied tenure by a 1-2 negative vote for reasons of alleged

"unsatisfactory qualities of character" and "personality" as well as a charge that Prof. Kaplan did not evidence a "willingness to cooperate" in accomplishing university and college objectives. At the outset, every sentence, every phrase, every word of those charges is wholly and absolutely false, unfounded, and unsupported by a shred of proof or any documentation whatsoever. (St. John's University could find no objective bases for dismissing Prof. Kaplan, and hence it was compelled to fabricate these subjective charges; charges shamefully and outrageously false in each and every respect.) In the district court, Prof. Kaplan submitted a 71 page affidavit, including exhibits, which refuted each and every allegation concerning his "unwillingness to cooperate with others" but, without an oral deposition, Prof. Kapla cannot refute the totally false charge of

"bad character and personality." (St. John's University has refused to furnish specifics on the "character" and "personality" charge, which is a direct violation of the provisions of the labor agreement. (49a).) Prof. Kaplan cannot shake this badge of infamy without an opportunity to clear his name. Board of Regents v. Roth, 408 U.S. 564, 573, n. 12 (1972).

Prof. Kaplan filed a grievance with his union dated December 19, 1980 claiming a number of violations of the labor agreement, and apart from demanding $150.00 as a precondition for processing his grievance, the union waited one (1) year before advising Prof. Kaplan that it would not pursue his grievance to arbitration, that delay is itself a fair representation breach. Robesky v. Quantas Airways, 573 F.2d 1082, (9th Cir. 1978).

Since 1972 Prof. Kaplan has served pro bono as an arbitrator in the Small Claims Part of The Civil Court of The City of New York, and St. John's University does not dispute that he met each and every objective element for tenure as described in the unversity's own rules and regulations. (50a). The Second Circuit has held that in "employment matters" a tenure granting committee acts on behalf of the university, and where non-objective factors or considerations are used, the adversely affected member is entitled to discovery as to motive for such tenure denial. Gray v. Board of Higher Education, 92 F.R.D. 87 (S.D.N.Y. 1981), rev'd, 699 F.2d 901 (2d Cir. 1982); In Re Dinnan, 661 F.2d 426 (5th Cir. 1981); cert. denied, 102 S.Ct. 2904 (1982).

Prof. Kaplan, is an attorney at law, and was dismissed for some unspecified "character" and "personality" defects, clearly a "stigma" of the type this Court recognized in Board of Regents v. Roth, 408 U.S. 564, 565, 573, n. 12. (1972). Moreover, and more egregious, is that not only has the university hung an Albatross around Prof. Kaplan's neck, but has contemporaneously, foreclosed him from obtaining or seeking other teaching opportunities, a matter that was clearly documented with an appointment letter from the new college and a teaching schedule. Prof. Kaplan was to commence his new teaching duties at the new college in September 1981, but his appointment as Assistant Professor of Law was withdrawn after he gave as reference the names of Catherine J. Ruggieri, then Acting College Dean and Margaret S. MacNamara, then Acting Department Chairperson.

Such conduct on the part of St. John's University and its agents cries out for a hearing to remove the stigma created by the attack on Prof. Kaplan's character and personality. Documents to support the contention that Prof. Kaplan obtained another teaching position is annexed hereto at appendix 113a-115a.

Proceedings Below

The original complaint was filed in the district court on June 25, 1981. Both the employer and the union moved for summary judgment which was granted on the grounds that "plaintiff has failed to allege the necessary element of bad faith on the part of the union." citing Balowski v. U.A.W. 372 F.2d 829 (6th Cir. 1967). 4/

4/ In both the order granting summary judgment, and in denying petitioner's motion to file an amended complaint, the district court repeatedly referred to a "teaching schedule" grievance as if that were the core of Prof. Kaplan's claim of the union's fair

The Second Circuit affirmed in a summary opinion filed February 10, 1983. (13a-16a).

In that summary opinion the circuit court held that Prof. Kaplan's appeal from the departmental to the college level tenure committee absolved the union of its fair representation breach, when in fact, such a procedural appeal was compelled by published university policy. More important however, is that such an appeal is a legal requirement that a plaintiff first exhaust his internal administrative remedies. The fact is that the union plays absolutely no

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Footnote 4 cont'd.

representation breach. Prof. Kaplan was effectively dismissed in October 1980, and he was obviously more concerned about the loss of his job than a January 1981 teaching schedule grievance. The lower court, apparently misperceived the most essential facts of Prof. Kaplan's claim, and the university added to this misconception by filing a false Rule 9(g) statement contending that Prof. Kaplan never filed a grievance protesting his wrongful discharge.

role whatsoever when a faculty member proceeds through the four tiers of administrative processing for tenure, viz., from department to college to university to Board of Trustees. However, in Prof. Kaplan's case he was given a 1-2 negative vote at the departmental level, and under university policy his final appeal was to the college level tenure committee; he therefore could not proceed to the university level tenure committee. Hence, most respectfully, this first paragraph by the circuit court is plainly wrong.

In the second paragraph of that February 10, 1983 summary opinion, the circuit court stated that "plaintiff <u>now</u> argues" that the union breached its duty of fair representation by extracting monies as a precondition to processing his "teaching?" schedule

grievance. That was not a "now", i.e., a new argument since it was contained in Prof. Kaplan's affidavit opposing the union-employer motion for summary judgment, including the two (2) checks accepted and endorsed by the union. (102a -105a).

Despite the fact that that second paragraph contained the suggestion that Prof. Kaplan amend his complaint, the district court denied his motion to amend which the circuit court then affirmed. (1a-3a; 4a-12a).

REASONS FOR GRANTING THE WRIT

1 - The summary affirmance by the Court of Appeals denying leave to serve an amended complaint directly conflicts with applicable, and strongly established principles and decisions of this Court as well as with the statutory spirit of Rule 15(a) of the Federal Rules of Civil Procedure that amendments be "freely granted."

A. The rationale of the lower courts would vitiate Fed. R. Civ. P. 15(a) since every amendment of a pleading, to cure an omission of an essential allegation, would be considered res judicata.

2 - Neither the district court, the court of appeals, the employer nor the union has disputed the fact that the proposed amended complaint states a cause of action, an issue not addressed by either of the lower courts. The amendment of pleadings, particularly

before trial, is an especially common practice, and review by this Court would have general application under a widely reoccurring civil procedure.

A. The recent decision of this Court in Bowen v. U.S. Postal Service, 103 S.Ct. 588 (1983) now places primary responsibility for lost wages on the union, and the proposed amended complaint very definitely states a claim against the union under Vaca v. Sipes, 386 U.S. 171 (1967) - an action only against the union. Also, United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) holds a union liable without a prerequisite or concurrent finding that the employer violated the labor agreement. Hence, most respectfully, the decisions below are plainly wrong, and has resulted in an unjust decision which deprived petitioner from having a clearly meritorious claim heard on the merits. Czosek v. O'Mara, Foman v. Davis, supra.

Foman v. Davis, 371 U.S. 178 (1962).

3 - The summary affirmance by the court of appeals is completely out of line with decisions of other circuits, and the Second Circuit Panel has sanctioned such a radical departure by the district court from such well defined and long established principles that review, and reversal, by this Court is required to maintain consistency between the circuits on the application of Fed. R. Civ. P. 15(a) and the interpretation of the "mandate" to lower cours under Foman v. Davis, supra.

4 - The Second Circuit Panel has so drastically and dramatically digressed from its own well established decisions dealing with complaints in fair representation cases that review by this Court is essential to bring about uniformity within the circuit court., e.g., O'Mara v. Erie Lackawanna R. R. Co.,

407 F.2d 674 (2d Cir. 1969), aff'd sub nom. Czosek v. O'Mara, 397 U. S. 25 (1970).

A R G U M E N T

I

The Decision of the Circuit Court Panel is in Direct Conflict With The Strongly Established Principles of This Court

A. The "mandate" issued by this Court to the lower courts under Foman v. Davis, supra, was not "heeded" by disallowing the amended pleading.

Seven (7) Supreme Court Justices agreed with the view that, "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." Foman v. Davis, 371 U.S. 178, 181 (1962). "Federal Rules of Civil Procedure 15(a)," this Court continued, "...declares that leave to amend 'shall be freely given when

justice so requires'; this mandate is to be heeded." (emphasis supplied). Foman v. Davis, 371 U.S. at 182. This "mandate" and spirit that causes be tried on the merits is also contained in Fed. R. Civ. P. 15(a) as well as in Fed. R. Civ. P. 8(f), viz., "All pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f) when read in conjuction with Rule 15(a) reinforces this Court's "mandate" that cases be heard on their merits and not on the technical aspects of pleadings. Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980); S.S. Silberblatt, Inc., v. East Harlem, 608 F.2d 28 (2d Cir. 1979); Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978).

Again, this Court in Conley v. Gibson, 355 U.S. 41, 45 (1957):

> "All pleadings shall be construed to do substantial justice, and the federal rules reject the approaches

> that pleadings are a game of skill in which one misstep by counsel is fatal. (emphasis supplied.)"

Neither the district nor the circuit court evaluated the proposed amended complaint against any of the factors listed by this Court in Foman v. Davis, supra. This is a pre-trial, pre-deposition case and neither the union nor St. John's University would have been adversely affected by allowing the service of the amended complaint - at that stage of the proceedings., e.g., The factors cited by this Court, and other courts, are: 1. Would the proposed amendment cause undue delay? 2. Is the amendment being offered in bad faith? 3. Ha there been any dilatory motives? 4. Would the amendment unduly prejudice the opposing party? 5. Has there been a repeated failure to cure the pleadings by previously allowed amendments? 6. Does the

proposed amendment cure the claimed defect or omission? Usery v. Marguette Cement Co., 568 F.2d 902 (2d Cir. 1977); Clay v. Martin, 509 F.2d 109 (2d Cir. 1975); Skeham v. Bloomsburg State College, 590 F.2d 470 (3rd Cir. 1978); Lockett v. General Financial Loan Co., 623 F.2d 1128 (5th Cir. 1980). The district court applied res judicata to the proposed amended complaint even though it, nor the court of appeals, ever addressed the issue of the union's demand for monies as a precondition to processing the discharge grievance. There was no articulation by the district or the circuit court in assessing the proposed amended pleading against the Foman v. Davis criteria. 6/ Prof. Kaplan's contention that the union breached its duty of fair representation was later supported by the N.L.R.B. in a decision involving a union

6/ "Articulate Reasons", Judge Bernard S. Meyer, New York State Court of Appeals admonishing against "conclusory euphemisms" in appellate decisions. N.Y.L.J., April 26, 1984.

which had demanded that a wrongfully discharged employee post a "$50.00 dispute bond", as required by the labor agreement, in order to have his grievance processed. The N.L.R.B. sustained a charge that the union breached its duty of fair representation. Boilermakers, Local 72, 260 N.L.R.B. No. 33 (1982).

II

The "Heeding" of the "Mandate" by the Lower Courts as well as the Consistent Application of Fed. R. Civ. P. 15(a) Has Consequences of General Application

A. The Circuit Court Panel Declined to Exercise Its Independent Discretion on Appellate Review Solely Because the District Court Did Not Address the Issue of the Union's Demand for Monies in its Opinion

When the findings and conclusions of a district court are based on documentary, rather than oral evidence, these documents

do not carry the same weight on appellate review. Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir. 1950), and when a lower court misreads an undisputed document, the circuit court is free to substitute its own reading of that document. Eutectic Corp. v. Metco, Inc., 579 F.2d 1, 5 (2d Cir. 1978). Even though the same majority of the Second Circuit Panel had the 2 checks, totalling $150.00, before it on the first appeal from the order granting the union-employer summary judgment, as well as on the second appeal denying petitioner's motion to amend his complaint so as to allege the demand for monies in the amended complaint, neither court addressed or considered the issue; the intentional side-stepping of that issue is, most respectfully, an abuse of discretion under the Second Circuit's own prior decisions.

Had petitioner followed the guidelines of Fed. R. Civ. P. 8(a)(2) and cast his allega-

tions in a "short and plain statement of the claim", the key allegation of the union's "extracting" monies as a "precondition" for processing his wrongful discharge grievance would have been furnished by the discovery and disclosure devices: - precisely the very point made by Former Chief Judge Lumbard in O'Mara v. Erie Lackawanna R.R. Co., 407 F.2d 674 (2d Cir. 1969), aff'd sub nom. Czosek v. O'Mara, 397 U.S. 25 (1970):

> "Particularly in suits of this kind where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed whenever possible to avoid dismissals based on technical deficiencies in the specificity of the allegations. At the least a plaintiff should be given the opportunity to file supplemental [amended] pleadings unless it appears "beyond doubt" that he cannot state a good cause of action." (emphasis added.)

The Second Circuit Panel, most respectfully, failed to follow its own extremely clear guide in reviewing fair representation complaints.

The Second Circuit Panel also by-passed its own very significant opinion in Abrams v. Carrier Corp., 434 F.2d 1234 (2d Cir. 1970), a case illustrating the favor with which the Second Circuit generally views fair representation claims:

> "Appellants seek to charge steelworkers with a breach of its duty of fair representation. Apart from the fact that this paragraph [of the complaint] defies normal grammatical interpretation [but] in light of our duty to liberally construe fair representation claims, Czosek v. O'Mara, 397 U.S. 25 (1970), the complaint can be read as raising a claim that the Steelworkers violated its duty to represent the appellants fairly." (emphasis added.)

The language in Abrams v. Carrier Corp., supra, and the clear opinion of Former Chief Judge Lumbard in Czosek v. O'Mara, supra, can in no way be reconciled with the summary affirmance by the Circuit Court Panel in this case now before this Court for review. Also sidestepped was the Second Circuit's opinions in Steinman v. Spector Freight System, Inc., 476 F.2d 437 (2d Cir. 1973) (Second Circuit

approved bifurcated trial in allowing the employee to first proceed against the union); Schum v. South Buffalo R.R. Co., 496 F.2d 328 (2d Cir. 1974) (discharged employee cannot be denied his day in court because his union failed to provide him fair representation.)

Should a wrongfully discharged - and stigmatized employee - be penalized because he originally included documentary evidence of a union's fair representation breach in his affidavit opposing summary judgment rather than as an allegation in the complaint? "At the least" he should be afforded an opportunity to amend. Czosek v. O'Mara, supra; Smith v. Evening News Ass'n., 371 U. S. 195, 200-201 (1962); Bowen v. U.S. Postal Service, supra.

B. The Two Opinions of the District Court

1. First opinion - September 21, 1982 (19a-36a).

2. Second opinion - November 16, 1983 (4a-12a).

The district court, in its first opinion, dealt with the "teaching schedule grievance" (of January 1981) instead of focusing on the wrongful discharge grievance which was filed on December 19, 1980. (25a, second paragraph). The district court measured the teaching schedule grievance against the standards of Vaca v. Sipes, supra, and concluded that the union did not breach its fair representation duty, even adding footnote 1. to show that a union can settle a grievance short of arbitration. (36a). Indeed, a union can compromise a grievance before arbitration, but that fact is wholly irrelevant (it is of no consequence and has no logical connection to the facts in Prof. Kaplan's case), and the district court's citation indicates that the lower court misperceived the most essential facts of this case. This

petitioner has been completely frustrated in getting the Circuit Court Panel to address this misconception.

In its second opinion, the district court insisted on focusing on the inconsequential "teaching schedule grievance." (5a). Apart from the fact that not a single case cited by the district court supports its holding that res judicata applies to a pre-trial motion to amend a complaint to cure an omission, again, the footnotes call for brief comment. (11a-12a). In footnote 2., the district court states that, "Though differently worded, the same violations are again asserted in the amended complaint." Yet, a reading of the opinions show the obvious omission of any articulation on the issue that the union demanded monies as a precondition for processing Prof. Kaplan's discharge grievance. Neither the district court nor the Circuit

Court Panel (the same majority decided both appeals) sought to consider whether or not the union-money allegation was sufficient to state a cause of action. In footnote 3. the district court sought to distinguish Foman v. Davis, supra, by stating that, "Here plaintiff does not interpose an alternative theory of recovery but rather attempts to buttress the existing one, which has already been adjudicated." How could it have been adjudicated when neither the district court nor the appellate court either addressed or considered the union-money allegations, which, as noted previously was not "new" since it was contained in Prof. Kaplan's affidavit submitted in opposition to the union-employer motions for summary judgment. 7/

7/ Five of the cases cited by the district court involved real property rights where res judicata is at its "zenith." In Estevez v. Nabers, 219 F.2d 321-3 (5th Cir. 1955) the court actually held that, "The cardinal principle is that the second action is precluded unless the new allegations supply a material deficiency of the complaint in the first action."

The same majority decided two successive appeals, and in both decisions the appellate panel declined to address or consider the most crucial issue of this case, viz., the demand by the union that the petitioner pay the union monies as a precondition for meeting with union counsel and the union grievance committee in order to process his wrongful dismissal by St. John's University. That in itself would not warrant the granting of certiorari, but the Second Circuit Panel declined to pass upon that crucial issue solely because it was not addressed by the district court, and then the panel ignored its own decisions in fair representation cases and affirmed the denial to allow the service of an amended complaint. More significant, is that the appellate panel failed to "heed" the "mandate" of this Court in freely granting amendments to pleadings so that causes can be

heard on the merits. The appellate panel has sanctioned such a dramatic departure from this Court's mandate in Foman v. Davis, supra, and from its own well established principles of interpretation of Fed. R. Civ. P. 15(a) that the intervention of this Court's direction is necessary to "heed" its "mandate", and concurrently correct a grave injustice: - for not only has Prof. Kaplan been stigmatized with an outrageously false charge of "bad character", but the employer-university has foreclosed him from obtaining (or seeking) another teaching appointment. (113a-115a).

Finally, the lower courts failed to take cognizance of United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) which made it clear that a union can be held liable for a fair representation breach, without the need for the employee to

simultaneously prove that the employer has violated the collective bargaining agreement. Justice Stevens, at footnote 4 of his concurring opinion made this point very clear: (101 S. Ct. 1569, 107 L.R.R.M. 2007)

> "The fact that the underlying discharge may not have violated the collective bargaining agreement does not necessarily absolve the union of liability for its breach, although it may limit the size of the employee's recovery against the union. Thus, while a court considering an employee's claim gainst a union will evaluate the validity of the employer's underlying conduct, that evaluation is not central to the resolution of the duty of fair representation claim." (emphasis added.)

The rationale of the holding in United Parcel Service, supra, has been followed by several of the lower courts in determining that a union can be held liable for its unfair representation without a simultaneious, or even a prior, adjudication of the employer's breach of the labor

agreement. Del Casal v. Eastern Air Lines, 634 F.2d 295 (5th Cir. 1981); Dutrisac v. Caterpillar Tractor Co., 511 F.Supp. 719 (N.D. Cal. 1981); Long v. I.U.E.W., 544 F. Supp. 1375 (E.D. Pa. 1982).

Petitioner specifically requested the district court and the Second Circuit Panel to hold the union liable for its fair representation breach (not only for demanding and accepting the $150.00 but for waiting one (1) year before notifying petitioner that it would not pursue his grievance to arbitration) independently of any liability on the part of the employer but neither the district nor the circuit court confronted the issue.

Despite the fact that the petitioner-employee has cited a number of violations of the collective bargaining agreement by the employer, assuming however, that the

employer had not violated the labor agreement, the union, under United Parcel Service, Inc., supra, would, nevertheless, be liable for its fair representation breach, even if the size of the employee's recovery against the union would be limited. United Parcel Service, Inc., v. Mitchell, 101 S. Ct. 1569 at footnote 4 (1981).

Conclusion

For the reasons enumerated above, it is respectfully requested that this Court issue a writ directing the lower courts to determine whether or not the proposed amended complaint (41a-115a) states a cause of action as against the union, the employer, or both.

Respectfully submitted,

David Kaplan, Pro Se
67-23 198th Street
Fresh Meadows, N.Y. 11365

Tel: (212) 454-9411

Dated: June 21, 1984

APPENDIX

OPINION NO. 2 OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For the Second Circuit

Filed April 13, 1984

Docket No. 83-9037

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. RICHARD J. CARDAMONE,

Circuit Judges

- x

DAVID KAPLAN,

Plaintiff-Appellant,

v.

Order
83-9037

CATHERINE J. RUGGIERI, MARGARET S. MACNAMARA, THEORDORE MUZIO, GERALD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EAR R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY; ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P-F.A. AT ST. JOHN'S UNIVERSITY 9 an independent labor union),

Defendants-Appellees.

- x

David Kaplan appeals from an order of the United States District Court for the Eastern District of New York (Neaher, J.), filed November 17, 1983, denying his motion for leave to file an amended complaint in an action which previously had been subject to summary judgment, 547 F. Supp. 707, which this Court affirmed, No. 82-7721. Appellees request this Court to determine that Kaplan's appeal is frivolous and to award them damages, including attorney's fees and double costs, pursuant to Fed. R. App. P. 38.

We affirm substantially for the reasons set forth in the memorandum and order by Judge Neaher below. Because there is no indication that this appeal was brought in bad faith, see West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir.), cert. denied, 404 U.S. 871 (1971), appellees' request for damages under Fed. R. App. P.

38 is denied.

/s/ Wm. H. Timbers
Hon. William H. Timbers

/s/ E.A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/ Richard J. Cardamone
Hon. Richard J. Cardamone

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

OPINION NO. 2 OF THE DISTRICT COURT
Denying Motion to File Amended Complaint

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Filed
November 17, 1983

- x

DAVID KAPLAN, individually and on behalf of all other employees similarly situated,

81 CV 2059 (ERN)

Plaintiff,

-against-

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERALD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, a unit of ST. JOHN'S UNIVERSITY; ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE and EDWARD J. MIRANDA, as Co-Presidents of ST. JOHN'S CHAPTER OF THE A.A.U.P.-F. A. AT ST. JOHN'S UNIVERSITY (an indep. labor union),

Defendants.

- x

MEMORANDUM AND ORDER

APPEARANCES:

DAVID KAPLAN, ESQ.
Fresh Meadows, New York
Attorney Pro Se

MENDES & MOUNT
New York, N. Y.
Attorneys for non-Union Defendants

By JOAN S. O'BRIEN, ESQ.
(HERBERT D. SCHWARTZMAN, ESQ.
St. John's University,
Jamaica, N.Y., of Counsel)

HENRY T. BERGER, ESQ.
New York, N. Y.
Attorney for Union
Defendants

NEAHER, District Judge.

The plaintiff is an attorney who had been employed by St. Vincent's College of St. John's University as a Professor of Business Law. In October 1980, plaintiff applied for tenure and was denied. He appealed to the college personnel committee, which sustained the denial in December 1980.

In January 1981, plaintiff's teaching schedule was changed, causing him to miss a number of classes. The University moved to suspend him and plaintiff sought help from his union to challenge the University's actions. While harboring doubts concerning plaintiff's right to representation, the union did represent him at the grievance

proceeding. Plaintiff, however, did not receive the relief sought and commenced action in this Court against his former employer, various members of the faculty and administration, and the union.

The original complaint was filed in June 1981. This Court issued a Memorandum and Order in September 1982 granting summary judgment for defendants. That judgment was appealed in February 1983.

Plaintiff's argument to the Second Circuit included the claim that the union extracted a sum of money as a precondition to representation. The Second Circuit, in an unpublished order affirming summary judgment for defendants, addressed that claim and stated:

> "Plaintiff now argues that the union breached its duty of fair representation by extracting $50 and $100 payments from him as a precondition to processing his scheduling grievance.

> This claim is not raised in the complaint and despite plaintiff's legal background he has made no attempt to amend his complaint to include this theory as a basis of recovery. Hence the claim was not addressed in the district court's opinion and is not now properly before us for review."

Plaintiff now seeks to amend his complaint pursuant to Fed. R. Civ. P. 15(a), which provides that amendments may be made "only by leave of court...and leave shall be freely given when justice so requires." [1] The amended complaint alleges that the union extracted a sum of money as a precondition for representation. In support of the amendment, plaintiff asserts: the merits of the claim have not been heard, leave to amend should be freely given, and the Second Circuit suggested that he amend. [2]

Plaintiff's attempt to enlist the Second Circuit's aid is based on a rather generous construction of their words. That Court's decision, supra, disposed of plaintiff's

claim by pointing out his own error in not having amended earlier. It was hardly a suggestion that plaintiff had the right to amend.

Further, this Court determines that leave should not be granted. The original complaint included a claim that the union breached its duty of fair representation as a result of its handling of the grievance proceeding. Fed. R. Civ. P. 56 indicates that a "motion for summary judgment applies to the merits of a claim", Heyward v. Public Housing Administration, 238 F.2d 689 (5th Cir. 1956), "and if [granted] in favor of the defendant the judgment is in bar." 6 Moore's Federal Practice §56.03 at p. 56-55 (2d e. 1983). Therefore, plaintiff's general claim of unfair representation has been adjudicated on the merits.

The doctrine of res judicata applies to

prevent a cause of action from being relitigated between identical parties. When a judgment has been entered on the merits it is final as to the claim in controversy. That finality applies "not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which might have been offered for that purpose.'" Nevada v. United States, 51 U.S.L.W. 4974, 4979 (U.S., June 24, 1983) (No. 81-2245), (emphasis added), quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876). In other words, the final judgment puts an end to the cause of action. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948).

The applicable test for applying res judicata is

> "whether a different judgment in [a] subsequent action would impair the rights created pursuant to the judgment rendered in the prior action

> ...; whether the evidentiary basis of the first and second actions is the same...; or whether the essential facts and issues were similarly presented in both cases." Ellentuck v. Klein, 570 F.2d 414, 428 (2d Cir.1978); Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.), cert denied, 434 U.S. 903 (1977).

The Court in Expert Electric, cited with approval in Ellentuck, went on to say that:

> "The crucial element underlying all of these standards is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which operates to sonstitute the cause of action, not the legal theory upon which a litigant relies." Id. at 1234.

Here, plaintiff's claim certainly "might have been offered" before. His claim concerning the extracting of money by the union is inextricably linked to the claim of unfair representation; it is not an additional fact that has subsequently occurred but one which plaintiff was capable of pleading when the original complaint was filed. [3] Plaintiff did not bring this fact up then and is precluded from asserting it now.

For the reasons stated above, plaintiff's motion for leave to amend the complaint is denied.[4]

SO ORDERED

The Clerk of Court is directed to forward copies of this Memorandum and Order to plaintiff pro se and to counsel for defendants.

/s/ Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
November 16, 1983

F O O T N O T E S

[1] Fed. R. Civ. P. 15(a) states that:

> "(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

[2] The original complaint alleges violation of the collective bargaining agreement by the employer and violation of the duty of fair representation by the union. Though differently worded, the same violations are again asserted in the amended complaint. In addition to the claim regarding the representation, the Court has addressed those claims in its earlier opinion and will not do so again.

[3] Plaintiff cites Foman v. Davis, 371 U.S. 178 (1962), in support of his amendments. Foman allowed an amendment which stated an alternative theory of recovery. He plaintiff does not interpose an alternative theory of recovery but rather attempts to buttress the existing one, which has already been adjudicated. Plaintiff cannot revive a cause of action by asserting additional factual allegations. Estevez v. Nabers, 219 F.2d 321, 323 (5th Cir. 1955), 1B Moore's Federal Practice §o.410[1].

[4] In light of the Court's decision, it is unnecessary to reach the other defenses raised.

OPINION NO. 1 OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For the Second Circuit

Filed February 10, 1983

Docket No. 82-7721

Present:

HONORABLE WILLIAM H. TIMERS
Circuit Judge

HONORABLE RICHARD J. CARDAMONE
Circuit Judge

HONORABLE DUDLEY J. BONSAL*
District Judge

- -x

DAVID KAPLAN, individually, and on behalf of all other employees simarly circumstanced,

Plaintiff-s Appellants,

-against-

ORDER
Docket No. 82-7721

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO. GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A DONNELLY, ROBERT M. HENDRICK EAR R. WOODS, PAUL S. SZABO, JOHN C. ALEXION,

*U.S. District Court Judge for the Southern District of New York, sitting by designation.

C. CARL ROBUSTO: ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY: ST. JOHN'S UNIVERSITY: FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union),

Defendants-Appellees.

- -x

The order of the United States District Court for the Eastern District of New York, entered September 30, 1982, which granted defendants' motions for summary judgment is affirmed for the reasons stated in Judge Neaher's thorough opinion, reported at 547 F.Supp. 707 (E.D.N.Y. 1982). We add the following comments:

Regarding plaintiff's fifth cause of action, he now additinally alleges that even if the tenure decision was not subject to the grievance-arbitration

procedure, the union breached its duty of fair representation by misinforming him that it was pursuing his tenure claim through the grievance procedure and did not notify him until a year later that the procedure was inapplicable to a tenure decision. Assuming these allegations are true, plaintiff has not been damaged in any way by his reliance on the union's alleged representations. His tenure decision was appealed to the appropriate review body and decided despite the union's action and/or inaction in handling the matter. Hence, this new argument does not support plaintiff's claim of damages resulting from breach of the duty of fair representation.

Also, plaintiff now argues that the union breached its duty of fair representation by extracting $50 and $100 payments from him as a precondition to processing

his scheduling grievance. This claim is not raised in the complaint and despite plaintiff's legal background he has made no attempt to amend his complaint to include this theory as a basis for recovery. Hence, the claim was not addressed in the district court's opinion and is not now properly before us for review.

/s/ Wm H. Timbers

WILLIAM H. TIMBERS, Circuit Judge

/s/ Richard J. Cardamone

RICHARD J. CARDAMONE, Circuit Judge

/s/ Dudley B. Bonsal

DUDLEY B. BONSAL, District Judge

ORDER DENYING EN BANC PETITION FILED
MARCH 18, 1983

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, and and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of March, one thousand nine hundred and eighty-three.

- -x

DAVID KAPLAN, individually and on behalf of all other employees similary circumstanced,

Plaintiffs-Appellants,

v. No. 82-7721

CATHERINE J. RUGGIERI, et al.,

Defendants-Appellees.

- -x

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by counsel for the plaintiff-appellants, David Kaplan, etc.,

Upon consideration by the panel that

heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by

/s/ Francis X. Gindhart,
Francis X. Gindhart,
Chief Deputy Clerk

OPINION NO. 1 OF THE DISTRICT COURT
Granting Employer-Union Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - x

Filed
September 27,
1982

DAVID KAPLAN, individually and on behalf of all other employees similarly circumstanced,

Plaintiff,

81 CV 2059
(ERN)

-against-

MEMORANDUM
AND
ORDER

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERALD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE a unit of ST. JOHN'S UNIVERSITY; ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE and EDWARD J. MIRANDA, as Co-Presidents of ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an indep. labor union).

Defendants.

- - - - - - - - - - - - - - - - - x

APPEARANCES:

DAVID KAPLAN, ESQ.
Fresh Meadows, New York
Attorney Pro Se

MENDES & MOUNT
New York, N. Y.
Attorneys for non-Union
Defendants

By JOAN S. O'BRIEN, ESQ.
(HERBERT D. SCHWARTZMAN, ESQ.
St. John's University,
Jamaica, N.Y.,
Of Counsel)

HENRY T. BERGER, ESQ.
New York, N.Y.
Attorney for Union Defendants

NEAHER, District Judge.

Plaintiff, David Kaplan, brought this action for damages, injunctive relief and a declaratory judgment. He asserts six distinct causes of action and alleges that jurisdiction is vested in this Court by virtue of section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185 (1976), general federal question jurisdiction, 28 U.S.C. §1331 (1976), the Declaratory Judgment Act, 28 U.S.C. §2201 (1976), and the doctrine of pendent jurisdiction. His first claim requests that this Court construe the collective bargaining agreement (the "CBA") between defendant St.

John's University (the "University") and the American Association of University Professors (the "Union") and render a declaratory judgment on the issue of whether a faculty member can file a grievance against his departmental chairperson. The second claim alleges that the Union breached its duty of fair representation when it failed to take one of plaintiff's grievances to arbitration. The third and fourth claims complain that the University and several of the named defendants violated the CBA when they selected defendant Ruggieri to be Acting Dean of St. Vincent's College and defendant MacNamara to be a departmental chairperson. The fifth claim asserts that plaintiff was wrongfully denied tenure by the University, and in the sixth claim he contends that the University defamed his reputation when it published the reasons for

his denial of tenure.

The facts in this case are not in dispute. Until May of 1982, plaintiff was employed as a full-time Assistant Professor of Business Law at St. Vincent's College of St. John's University. In October 1980, plaintiff applied for tenure. Pursuant to the CBA provisions governing tenure applications, his application was reviewed and considered by the Departmental Personnel and Budget Committee, which was composed of elected, tenured faculty members Muzio, O'Boyle and Martin. On October 24, 1980, plaintiff was notified by mail that he had been denied tenure by a 2 to 1 negative vote of the Committee. The October 24th letter stated that tenure was denied because of plaintiff's "A) Failure to evidence satisfactory qualities of personality and character. B) Failure to evidence willingness to cooperate with

others in the achievement of the objectives of St. Vincent's College and St. John's University."

Plaintiff appealed this decision to the College Personnel Committee, which consisted of elected, tenured faculty members Donnelly, Hendrick, Szabo and Woods and Acting Dean Ruggieri. Plaintiff was informed that the Personnel Committee had sustained the denial of tenure by a memorandum dated December 11, 1980. The memorandum stated that the reasons for sustaining the decisions were those stated in the October 24th letter. Copies of this memorandum were sent to the Academic Vice President of St. John's University, defendant Robusto, and the Acting Chairperson of the Division of Administration and Economics, defendant MacNamara. According to University regulations, the second adverse ruling

on plaintiff's tenure application was final and unappealable. Plaintiff, however, sought and was denied the right to file a grievance against the University.

On January 14, 1981, the day prior to the first day of the spring 1981 semester, plaintiff was advised that he had been assigned to teach classes five days a week rather than his previous three-day work schedule. This new schedule conflicted with plaintiff's performance of non-University related obligations, which he did not wish to cancel. As a result, plaintiff failed to meet his newly scheduled classes on January 15 and January 20, and the University acted to suspend him. Plaintiff then requested a "personal conference" with the University president, which is required by University regulations before any disciplinary matter is referred

to a University Senate Committee for investigation and possible formulation of written charges. Prior to the conference, plaintiff sought Union representation, to which he maintained he was entitled under recent Supreme Court labor law decisions. Although the Union president, defendant Hueppe, disputed such entitlement, a Union grievance officer represented plaintiff at the "personnel conference."

Thereafter, on February 11, 1981, the Union submitted a grievance on behalf of plaintiff challenging his schedule change. The grievance procedure is a multistep procedure leading to arbitration at step III. Plaintiff's grievance was appealed to step II, but was not pursued to binding arbitration.

When relief requested was not forthcoming, plaintiff commenced this action. The case

is now before the Court on defendants' motion for summary judgment. For the reasons given below, defendants' motion is granted.

Summary judgment may be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R.Civ.P. Pursuant to the 1963 amendments, Rule 56(e) provides that when a motion for summary judgment is supported by proper affidavits (or by the other materials referred to in Rule 56(c), "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts

showing that there is a genuine issue for trial." As the Court of Appeals for this circuit has stated, once the movant has made the requisite showing,

> "an adverse party may not rest upon mere conclusory allegations or denials. The party opposing the motion must set forth 'concrete particulars', Dressler v. The MV Sandpiper, 331 F.2d 130, 133 (2d Cir. 1964), and cannot make a secret of his evidence, holding it close to his chest until the trial. See Donnelly v. Guion, 467 F.2d 290, 291 (2d Cir. 1972). It is not sufficient merely to assert a conclusion without supplying supporting arguments or facts in opposition to the motion. Id. at 293. See Applegate v. Top Associates, Inc., 425 F.2d 92, 96 (2d Cir. 1970)." Securities Exchange Commission v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978).

In determining whether to grant a motion for summary judgment, the Court "cannot try issues of fact; it can only determine whether there are issues to be tried." American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theateres, Inc., 388 F.2d 272, 279 (2d Cir. 1967), quoted in Securites Exchange

Commission v. Research Automation Corp., supra, 585 F.2d at 33. It must accept as true factual statements in the opposing party's favor, Hill v. A-T-O, Inc., 535 F.2d 1349 (2d Cir. 1976), and resolve any doubts in favor of the latter, American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., supra. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Adv. Com. Note to Proposed Amendments to Rule 56(e), 31 F.R.D. 648 (1962). See generally Applegate v. Top Associates, Inc., supra; Donnelly v. Guion, supra, 467 F.2d at 292. Hence, a party may not retreat to"the mere allegations or denials of his pleading" in the face of"a motion for summary judgment made and supported as provided in...[Rule 56]."

Rule 56 (e), F.R.Civ.P. (emphasis supplied).

Taking these factors into full consideration, the undisputed and sworn facts in the present record reveal that plaintiff's allegations in his complaint do not state a claim upon which relief can be granted. The right plaintiff seeks to have declared in his first cause of action - the right to bring a grievance against a departmental chairman - must fails as it does not present a genuine and present controversy. While plaintiff alleges that the denial of tenure was wrongful, he does not allege the then acting departmental chairman, defendant MacNamara, took part in the tenure decision. Plaintiff does not dispute defendants' contention that defendant MacNamara, as a non-tenured member of the faculty, was not eligible to vote on tenure applications and did not vote on plaintiff's application. Absent a relation

between the claimed injury, the denial of tenure, and the relief sought, a declaration that a grievance may be brought against a departmental chairperson, no justiciable issue can be said to exist and any opinion would be no more than advisory.

As to plaintiff's second claim that the Union breached its duty of fair representation as a result of its handling of his teaching-schedule grievance, plaintiff has failed to allege the necessary element of bad faith on the part of the union. Vaca v. Sipes, 386 U.S. 171, 190 (1967). It is plaintiff's burden to allege, as a threshold matter, some ill motive or arbitrary action on the part of the Union to support his claim. Balowski v. United Auto. Workers, 372 F. 2d 829, 835 (6th Cir. 1967). The allegations in plaintiff's complaint, however, negate any possible inference that

the Union acted in bad faith with regard to his grievance. While plaintiff alleges that the Union urged plaintiff to accept the scheduling change and initially asserted that his complaint was not subject to grievance-arbitration, he does not dispute defendant's contention that the grievance was processed by the Union.[1] Similarly, while plaintiff contends that the Union refused his request for a Union representative at his personnel conference with the University president, he does not deny defendant's statements that such representation was provided. Thus, plaintiff's second cause of action fails to state a claim for which relief can be granted. See Lewis v. Greyhound Lines-East, 55 F.2d 1053 (D.C. Cir. 1977), cert. denied, 534 U.S. 997 (1978).

Plaintiff's third and fourth claims relating to the appointment of a dean and a

departmental chairman must also be dismissed as plaintiff has failed to exhaust the exclusive grievance procedures established by the CBA. The relevant portions of the CBA specify the steps to be taken in handling a complaint by an aggrieved faculty member. The initial step in the procedure is the filing of a grievance with the appropriate chairperson or dean. Although plaintiff specifically denies that he failed to file a grievance concerning his denial of tenure, he does not deny that he failed to file a grievance concerning the appointment of defendants MacNamara and Ruggieri as departmental chairperson and college dean respectively. Plaintiff cannot circumvent the grievance procedures supplied by the CBA and consequently these claims must be dismissed. Clayton v. United Auto. Workers, 101 S. Ct. 2088, 2091 (1981); Republic Steel

Corp. v. Maddox, 379 U.S. 650, 652-3 (1965).

Plaintiff's fifth claim apparently alleges that the University's denial of tenure was arbitrary and unreasonable and that the Union breached its statutory duty of fair representation in failing to pursue this complaint through the grievance-arbitration procedures. Both parties agree that Article II, §2.4b of the CBA governs this dispute.

Section 2.4b specifically reserves to the Administration "the powers and authority" not modified by the CBA, with the caveat that those powers and authority not be exercised in arbitrary, unreasonable or discriminatory fashion. Only if they are exercised in such a fashion does any claim related to them become subject to the grievance-arbitration procedure. In all other cases, the disposition of the complaint is governed by the University regulations.

Assuming that the employer's denial of tenure in this case was arbitrary or unreasonable, as plaintiff alleges, §2.4b does not provide the full answer: On those subjects not expressly excluded by Article XXXI, §31.2 of the CBA are subject to the grievance-arbitration procedure. Section 31.2 expressly states that "the term 'grievance' shall not include...complaints relating to the merits of appointment, reappointment, promotion, academic freedom and tenure, which matters are governed by the Statutes and practices of the Administration." Thus, the clear language of §31.2 removes plaintiff's complaint from the grievance-arbitration procedure, and the Union cannot be said to have breached its duty to plaintiff in failing to instigate that procedure.

Since the merits of a tenure decision are

excluded from the grievance procedure, plaintiff's only relief in this case was the appeal procedures provided by the University's regulations, which all parties agree were faithfully carried out. Absent allegations that the denial of tenure violated either federal law or University regulations, plaintiff's fifth cause of action must be dismissed for failure to state a claim for which relief can be granted. See Lieberman v. Gant, 630 F.2d 60, 62 n.1 (2d Cir. 1980); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974).

Plaintiff's sixth claim for defamation rests solely on pendent jurisdiction. Plaintiff agrees that, if he prevails on none of the other causes of action, this Court should not retain jurisdiction over the defamation claim. Accordingly, the sixth claim is dismissed for lack of subject matter jurisdiction.

Defendants' motion for summary judgment is granted in all respects.

SO ORDERED.

The Clerk of Court is directed to enter judgment for defendants, and is further directed to forward copies of this Memorandum and Order to counsel for the parties.

/s/ Edward R. Neaher
U.S.D.J.

Dated: Brooklyn, New York
September 21, 1982

F O O T N O T E

[1] As the Court held in Vaca, supra, 386 U.S. at 192, "a union does not breach its duty of fair representation...merely because it settled the grievance short of arbitration."

DISTRICT COURT JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -x

JUDGMENT

DAVID KAPLAN, individually and on behalf of all other employees similary circumstances,

CV 81-2059 (Neaher)

Plaintiff,

-against-

Filed September 30, 1982

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERALD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, a unit of ST. JOHN'S UNIVERSITY; ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE and EDWARD J. MIRANDA, as Co-Presidents of ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an indep. labor union).

Defendants.

- -x

A memorandum and order of Honorable Edward R. Neaher, United States District Judge, having been filed on September 27, 1982, granting the defendants' motion for summary judgment in all respects, it is

ORDERED AND ADJUDGED that the plaintiff

take nothing of the defendants, and that summary judgment is hereby entered in favor of the defendants in all respects.

/s/ Richard H. Weare,

Richard H. Weare,
Clerk of Court

Dated: Brooklyn, New York
September 28, 1982

Proposed Amended Complaint

United States District Court
For The Eastern District of New York
- - - - - - - - - - - - - - - - - - - -x

David Kaplan, :
Civil
Plaintiff, :81-2059

- against - :

Catherine J. Ruggieri, et al. :

Defendants.
- - - - - - - - - - - - - - - - - - - -x

NOTICE OF MOTION
FOR LEAVE TO FILE AN AMENDED COMPLAINT
Pursuant to Fed. R. Civ. P. 15(a)

SIRS:

PLEASE TAKE NOTICE that upon the summary opinion of the United States Court of Appeals for the Second Circuit filed February 10, 1983, and upon the annexed amended complaint and all proceedings hitherto had herein, the undersigned will move this Court at a Motion Part thereof to be held in Chambers Room 252, United

States Court House in Brooklyn, New York on the 24th day of May 1983 at 9:30 a.m. or as soon thereafter as counsel can be heard for an Order pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to permit the service and filing of the annexed amended complaint, and for such other and further relief as to this Court may seem just and proper.

Dated: State of New York
County of Queens
May 10, 1983

/s/ David Kaplan
DAVID KAPLAN
Attorney for
Plaintiff
67-23 198th Street
Fresh Meadows, N.Y.
11365

Tel: (212) 454-9411

Proposed Amended Complaint

United States District Court
For The Eastern District of New York
- - - - - - - - - - - - - - - - - - - -x

David Kaplan,

Plaintiff,

- against -

Catherine J. Ruggieri, Margarest S. MacNamara, Theodore Muzio, Gerard T. O'Boyle, Melvin Martin, Marguerite A. Donnelly, Robert M. Hendrick, Earl R. Woods, Paul S. Szabo, John C. Alexion, C. Carl Robusto; St. Vincent's College, a unit of St. John's University; St. John's University; Frederick E. Hueppe and Edward J. Miranda, as Co-Presidents of St. John's Chapter of the American Association of University Professors-Faculty Association at St. John's University (an independent labor union).

Defendants.
- - - - - - - - - - - - - - - - - - - -x

Civil
81-2059
(ERN)

Demand
For
Trial
By
Jury

Plaintiff, complaining of the defendants, alleges as follows:

JURISDICTION

1. Jurisdiction is vested in the United States District Courts by virtue of

Section 301(a) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §185(a) (1976); 28 U.S.C. §1331 (1976), and the doctrine of pendent jurisdiction.

Nature of Complaint

2. This is an action against the employer (St. John's University) for wrongful discharge, and against the labor union for its breach of its duty of fair representation.

The Parties

3. Plaintiff has been a part time and full time college teacher for over twenty (20) years.

4. Plaintiff is an attorney at law, and law teacher, and has been duly admitted to practice law in the State of New York since 1956, and before this Court since 1957, and was also admitted to practice before the United States Court of Appeals for the

Second Circuit since 1959, and before the United States Supreme Court in 1961.

5. Plaintiff has always been in good standing before all of the above-mentioned courts.

6. Plaintiff was and still is engaged in the practice of law in the counties of the State of New York.

7. Plaintiff has always conducted himself with honesty and fidelity as an attorney and counselor at law, and as a law teacher, and has enjoyed an excellent reputation as a private citizen, and has had an outstanding reputation as a law teacher of academic excellence, and one of the most respected and popular teachers at St. John's University with an exceptional reputation for loyalty, good character and personality and commitment to the objectives of the institution. (Exhibit "A" annexed hereto.)

8. By reason of plaintiff's reputation for integrity, good character and personality and legal scholarship he has been selected on numerous occasions during the last twenty (20) years by attorneys at law, and other labor and management representatives to serve as an arbitrator in determining disputes between labor union and management.

9. Plaintiff was employed by defendant St. Vincent's College, a unit of St. John's University, from September 1976 through August 31, 1982 as an Assistant Professor of Business Law with a reputation as one of the most popular and respected faculty members at the university. (Exhibits "B" and "C".)

10. Defendant Catherine J. Ruggieri had been Acting Dean of St. Vincent's College from on or about March 1980, and on May 14, 1981 she was appointed Dean of said college by the university president.

11. Defendant Margaret S. MacNamara has been Acting Chairperson of the Division [Department] of Administration and Economics of St. Vincent's College since on or about July 1980. Plaintiff and defendant MacNamara (an attorney at law duly admitted to practice in the State of New York) were the only two full time faculty members exclusively teaching Business Law at St. Vincent's College.

12. Defendants Theodore Muzio, Gerard T. O'Boyle and Melvin Martin are members of the tenure committee for the Department of Administration and Economics of St. Vincent's College (hereinafter "departmental tenure committee".)

13. Defendants Marguerite A. Donnelly, Robert M. Hendrick, Earl R. Woods, and Paul S. Szabo are members of the tenure committee for St. Vincent's College (hereinafter "college tenure committee) with responsibi-

lity for acting upon tenure applications previously acted upon by the various departmental tenure committees, and acts as the final appeal body for tenure applications which have been disapproved by any of the departmental tenure committees.

14. Defendant John C. Alexion is a Vice President of St. John's University, and in such capacity exercises administrative direction over defendant Catherine J. Ruggieri as the Dean of St. Vincent's College.

15. Defendant C. Carl Robusto is Academic Vice President of St. John's University, and in such capacity serves as the university's chief executive officer immediately under the office of the president.

16. Defendant St. John's University is a private educational institution of higher learning (St. Vincent's College is a unit thereof) and chartered by the Board of

Regents of the State of New York.

17. Defendant St. John's University is an "Employer" within the meaning of 29 U.S.C. §152(1)(2).

18. Defendant St. John's Chapter of the American Association of University Professors-Faculty Association at St. John's University is a "labor organization" within the meaning of 29 U.S.C. §152(5), and has been jointly certified as the exclusive collective bargaining agent for full time faculty members within the purview of 29 U.S.C. §159(a).

The Collective Bargaining Agreement

19. The relevant portions of the collective bargaining agreement (1977-1980) in effect at the time the instant action arose provides as follows:

Article II

General Relationship Between the AAUP-FA and the Administration

" ¶2.2...The provisions of the [University] Statutes which are not in conflict with the provisions of this Agreement shall be assimilated into and made part of any individual contract of employment between a faculty member and the University. In the event of a conflict between the provisions of the Statutes and the terms of this agreement, the latter shall be controlling."

" ¶2.3...This Agreement shall be incorporated by reference into employment contracts issued to faculty members."

" ¶2.4b...[T]he parties agree that all the rights, power and authority of the Administration which have not been abridged or modified by this Agreement are retained by the Administration. The existence and right to exercise such powers and authority shall not be subject to the grievance-arbitration procedure set forth in this Agreement, but any claim of arbitrary, unreasonable or discriminatory exercise of such powers and authority relating to the terms and conditions of employment shall be subject to such grievance-arbitration procedures."

Article IV
Academic Rank and Qualifications

"¶4.3 The qualifications for the above ranks [Professor, Associate Professor, Assistant Professor, Instructor and Research Professor] shall be those set forth in Article 26 of the [University] Statutes except as modified by this Agreement."

Article VI
Academic Freedom

" ¶6.1 The parties incorporate herein by reference the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors in accordance with the endorsement of the Board of Trustees of the University on January 15, 1968.

In furtherance of the foregoing, the parties hereby incorporate into this Agreement the following quotation from the 1966 Agreement:

"The right of...a faculty member...to speak on general educational questions or about the administration and operation of his own institution is part of his right as a citizen and should not be abridged by the institution. There exists, of course, legal bounds relating to defamation of character, and there are questions of propriety."

The St. John's University Statutes

20. Defendant St. John's University, over the years, has through its Board of Trustees promulgated and implemented a series of by-laws for the internal governance of the University and its constituent schools and colleges. Such by-laws also serve as a means of announcing administrative, academic and

personnel policies. These by-laws are commonly referred to in the academic community as University Statutes, or simply Statutes.

21. The relevant portions of the St. John's University Statutes provide as follows:

PART NINE
QUALIFICATIONS AND CONDITIONS FOR APPOINTMENT REAPPOINTMENT, AND PROMOTION

Article 26 Qualifications and Conditions

¶26.13 Associate Professor-St. Vincent's College

"For promotion or appointment as an Associate Professor in St. Vincent's College the candidate must possess the qualifications for an Assistant Professor in St. Vincent's College, and in addition must:...(b) possess the terminal degree or its equivalent as specified in ¶26.3 for faculty members in Accounting, Business Law or related areas of Criminal Justice (c) complete seven years of full-time college teaching; and (d) evidence professional achievement in the field of specialization or in the teaching of the field of specialization through two or more of the following: noteworthy professional activities in the arts and/or humanities; active membership in professional societies and a record of attendance at meetings of learned societies; professional growth and/or recognition such as professional consultation, or professional practice; active participation in community work of a significant educational nature. For promotion, the

candidate must also have demonstrated adequate service in the way of commitee assignment or similar activities to the Division, St. Vincent' College and/or the University."

22. Pursuant to the above tenure criteria plaintiff has engaged in "professional practice"; is an active member of professional and other learned societies and has actively participated in community work of a significant educational nature; has served on departmental and college committees and has substantially and materially assisted the institution in enhancing its administrative efficiency. (Plaintiff holds the M.S. from Stevens Institute of Technology and formerly held the position of Chief of Management Engineering for the U.S. Government.) (A few examples are, Exhibits "A", "D" "M" "N".)

23, Since 1972 plaintiff has continuously served as a volunteer Arbitrator in the Small Claims Part of The Civil Court of The City of New York in the County of Queens, and has

actively participated in the Compulsory Arbitration Program under the direction of the Chief Judge of The State of New York, and plaintiff has applied his management engineering skill to such program. Annexed hereto as Exhibit "D" is a letter from the Honorable Francis X. Smith dated June 5, 1981 addressed to plaintiff commending him for his proposals in such a program in which plaintiff participated on his non-teaching days, in partial fulfillment of the tenure requirements.

24. Plaintiff more than met each and every objective element for tenure.

25. Plaintiff more than met each and every objective element for tenure as compared to other faculty members at St. Vincent's College who have been granted tenure since 1976.

26. Sometime during the Spring 1980 term defendant Gerard T. O'Boyle declined to continue serving as Chairman of the Division of

Administration and Economics, and defendant John C. Alexion directed that an election be held to choose a successor.

27. Plaintiff and defendant Margaret S. MacNamara as members of the said Division were the only two full time faculty members exclusively teaching Business Law, and hence entered into an oral agreement that neither one would seek the chairmanship because under existing school paractices, a departmental chairperson is assigned a reduced teaching load of only three (3) courses, whereas all other full time faculty members teach five (5) courses at St. Vincent's College. Such a reduced teaching load for either plaintiff or defendant MacNamara would of necessity, inter se, shift to the other: (a) undue pressure to assume an excessive teaching load, (b) disrupt predetermined teaching schedules, and (c) create class scheduling

problems in the ensuing school terms.

28. Pursuant to the above oral agreement with defendant MacNamara, plaintiff wrote a memorandum to defendant Alexion dated March 25, 1980 declining to be considered for the position of chairman despite the fact that plaintiff had the almost full support of his colleagues, and had a reputation for administrative efficiency. (Exhibit "E" annexed hereto.)

29. In breach of the aforesaid oral agreement between plaintiff and defendant MacNamara, defendant MacNamara, upon the insistence of defendant Acting Dean Catherine J. Ruggieri and with the approval of defendant Alexion, entered her name as a nominee for the position of departmental chairperson.

30. At the election for departmental chairperson on May 7, 1980, supervised by defendant Alexion, defendant MacNamara was

unanimously rejected by her own faculty peers eligible to vote.

31. Almost immediately after the counting of the ballots by defendant Alexion, defendant MacNamara accused plaintiff of leading opposition to her election - a wholly unfounded and false accusation against plaintiff.

32. Despite her total defeat for the position of departmental chairperson, the employer appointed defendant MacNamara as acting chairperson on or about July 1, 1980, and almost immediately thereafter defendant MacNamara made a speicific point of telling plaintiff, "Forget about a three day teaching schedule.", meaning to convey to plaintiff that she would see to it that plaintiff would be assigned a teaching schedule other than that which plaintiff had been teaching, knowing that plaintiff had made prior commitments to

perform legal services on those days that plaintiff was not scheduled to teach; these commitments having been made by plaintiff weeks and very often months in advance.

33. Despite such actual knowledge regarding plaintiff's legal commitments, defendant MacNamara advised plaintiff on Wednesday, January 14, 1981 that he would now be compelled to teach a class the next day, and on every Tuesday and Thursday thereafter, the two days on which plaintiff was not previously scheduled to teach any classes.

34. Defendants Ruggieri and Alexion then approved and ratified such eleventh hour class assignment which, in turn, compelled plaintiff to teach five (5) days per week - a rarity in college teaching - and caused plaintiff to cancel all his prior professional and legal commitments on Tuesdays and

Thursdays.

The Tenure Process

35. Plaintiff and defendant MacNamara were to be considered for tenure at the same time during the 1980-1981 academic year.

36. In order to insure that defendant MacNamara attain tenure despite her infinitely lesser qualifications as measured against the objective elements for such tenure as described in paragraph numbered 21, above, defendant Margaret MacNamara in concert with defendant Dean Catherine J. Ruggieri embarked in a joint effort to discredit and impugn plaintiff's character and good reputation for the following reasons:

(a) for the personal gain of defendant Margaret S. MacNamara at the expense of plaintiff since her own tenure application was to be considered at the same time as

that of the plaintiff, and her own qualifications for such tenure were substantially and materially secondary to that of plaintiff; and

(b) in retaliation against plaintiff for allegedly being instrumental in her unanimous defeat by her own peers for the position of departmental chairperson.

37. Since plaintiff more than met each and every objective element for tenure as set forth under the tenure criteria, the only way defendant Margaret S. MacNamara and Catherine Ruggieri could deprive plaintiff of his employment status, so as to gain such status for defendant MacNamara, was to fabricate some subjective, false and pretextual reasons, and then set it down before the tenure granting committees.

38. Pursuant to such conspiracy between

defendants MacNamara and Ruggieri, defendant MacNamara informed members of the division tenure committee, consisting of defendants Muzio, Martin, and O'Boyle, that she had information - to this day never revealed to plaintiff - that was derogatory of plaintiff's character and personality.

39. On October 21, 1980 plaintiff appeared before the division tenure committee, and by letter dated October 24, 1980, which was composed, published and signed by defendant MacNamara, with a copy furnished to defendant Ruggieri, and upon information and belief copies were furnished members of the division tenure committee and to defendants Alexion and Robusto, plaintiff was effectively dismissed from his teaching job by a 1-2 negative vote under the following exact words:

"The negative votes were based on the

following reasons:

" 1) Failure to meet or possess all of the prior qualifications for the lower ranks; specifically, "

" A) Failure to evidence satisfactory qualities of personality and character.

B) Failure to evidence willingness to cooperate with others in the achievement of the objectives of St. Vincent's College and St. John's University."

40. Plaintiff was then required, under existing policy, to appeal the October 24, 1980 decision from the division tenure committee to the college tenure committee so as to exhaust the existing administrative remedies.

41. By memorandum dated December 11, 1980, composed and published by defendant College Dean Catherine J. Ruggieri, and type by V. Boke, addressed to plaintiff, with a copy distributed to defendants MacNamara and Robusto, the college tenure committee consisting of defendants Donnelly, Hendrick,

Woods, Szabo and Ruggieri, ratified, condoned and approved the defamatory statements contained in the letter to plaintiff published on October 24, 1980. (Exhibit "F" annexed hereto.)

42. In matters of employment a tenure granting committee acts on behalf of the employer.

43. On December 19, 1980 plaintiff filed a grievance with the defendant union, citing paragraph 2.4b of the collective bargaining agreement, claiming that plaintiff's dismissal from his employment was arbitrary, unreasonable and discriminatory, and that the employer, through the tenure committees, had exercised its powers in an arbitrary, unreasonable and discriminatory manner with respect to the terms and conditions of employment. Under the collective bargaining agreement the employer's exercise of arbitrary, unreasonable and discriminatory power and authority is subject

to the grievance-arbitration procedure. (Exhibit "G" annexed hereto.)

44. The defendant union had never submitted any grievance to arbitration which has resulted in an arbitrator's opinion interpreting any provisions of any of the collective bargaining agreements to which it has been a party with this employer.

45. On January 24, 1981, more than one (1) month after plaintiff filed his grievance with the union, the union made a demand that plaintiff pay the union the sum of fifty ($50.00) dollars as a precondition for processing his wrongful discharge claim.

46. Pursuant to the union's demand, plaintiff drew a check in the sum of fifty ($50.00) dollars dated January 24, 1981 (Exhibits "H" and "H[1]" annexed), which check the union later endorsed and deposited for

collection.

47. On May 4, 1981, plaintiff was scheduled to meet with Henry T. Berger, Esquire, the attorney for the union, but, as a precondition for such a meeting with union counsel, the union co-president Frederick E. Hueppe demanded that plaintiff pay the union one hundred $100.00) dollars.

48. Pursuant to the union's demand, plaintiff drew a check in the sum of one hundred $100.00) dollars, which check the union later endorsed and deposited for collection. (Exs "I" and "I[1]".)

49. During the meeting on May 4, 1981 with union counsel, at which meeting union co-presidents Frederick E. Hueppe and Edward J. Miranda were present as well as other officials of the union, neither union counsel nor the union co-presidents, nor any other union official present said anything about

plaintiff's wrongful discharge grievance not being arbitrable under the labor-management agreement.

50. On December 11, 1981, one year after plaintiff filed his wrongful discharge grievance, the union - FOR THE FIRST TIME - put forth a contention that plaintiff's grievance was not subject to the grievance-arbitration procedure contained in the labor agreement.

51. A union is required to use "special care" when handling a discharge grievance.

52. A union must fairly represent all members of the collective bargaining unit.

53. The extracting by the union of first, fifty ($50.00) dollars on January 24, 1981, and then another one hundred ($100.00) on May 4, 1981, as a precondition for processing plaintiff's wrongful discharge grievance (a grievance which was percipitated by the

employer in terminating plaintiff's employment for no apparent or any discernable reason) caused the grievance procedure to malfunction, and by reason thereof the union breached its duty of fair representation.

AS AND FOR A SECOND CAUSE OF ACTION

54. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 1 through 42 of this complaint.

55. On or about April 1976 the defendant university was notified by the New York State Department of Education of its concern that all institutions of higher learning make available to students an appropriate process for redress of student complaints.

56. The then Dean of St. Vincent's College, George W. Maxey, knowing of plaintiff's experience with grievance procedures asked plaintiff to draft the policies, rules and regulations for a proposed "Academic Fairness Committee" to handle the processing of

student complaints, a concept publicly favored by the university president.

57. A refusal by plaintiff to accept the writing assignment would have meant certain denial of plaintiff's future tenure application since no faculty member can achieve academic tenure without a favorable recommendation from the college dean, and the departmental chairperson.

58. Both union co-presidents Hueppe and Miranda voiced opposition to the establishment of an Academic Fairness Committee.

59. The union then took an open and public position opposing the Academic Fiarness Committee concept as an impingement upon academic freedom.

60. The union's vigorious opposition to the concept of an Academic Fairness Committee, and plaintiff's countervailing advocacy of the

due process benefits inuring to students from such a concept accounted, in part, for the union's hostility towards plaintiff, and the bad faith in which the union handled the plaintiff's discharge grievance and by reason of such hostility and bad faith the union breached its fair representation duty.

AS AND FOR A THIRD CAUSE OF ACTION

61. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 1 through 59 of this complaint.

62. Defendant Muzio, a teacher of Economics, as well as a member of the departmental tenure committee, who would later pass upon plaintiff's tenure application, became so openly hostile to plaintiff for his advocacy of the Academic Fairness Committee concept that on or about March 28, 1979, outside the Office of the College Dean, he directed the following remark to plaintiff, "You lousy lawyers and your due process."

63. Plaintiff, after the 1-2 negative vote by the departmental tenure committee, sought to ascertain the reasons for the attack on plaintiff's character and personality from both defendant Ruggieri (then the acting college dean) and defendant O'Boyle (then plaintiff's departmental chairman) but such efforts were met with complete silence.

64. The A.A.U.P., one of the two certified co-unions had endorsed a policy (cited in the collective bargaining agreement under ¶6.1) in its 1940 Statement of Principles on Academic Freedom and Tenure (subsequently expanded by other "Statements" of policy) that a dismissed faculty member be given the reasons for such dismissal, and the university-employer has refused to furnish plaintiff such reasons.

65. "Plaintiff cannot be expected to disprove an employer's reasons unless they have been articulated with some specificity."

66. The employer dismissed plaintiff for wholly subjective, non-academic, discriminatory and arbitrary reasons, motive and intent, completely divorced from rationality.

67. By reason of the employer's refusal to furnish plaintiff with the reasons for his stigmatized wholly unjustified dismissal, and provide plaintiff with some specificity as to the basis for such wrongful discharge, the employer has violated ¶6.1, and other provisions of the collective bargaining agreement.

AS AND FOR A FOURTH CAUSE OF ACTION

68. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 1 through 66 of this complaint.

69. Members of the tenure granting com-

mittees had voiced opposition to the concept of an Academic Fairness Committee, but the concept was publicly favored by the university president and plaintiff's college dean, and plaintiff was requested to write the policies, rules and regulations for such a committee by his college dean.

70. Paragraph 6.1 of the labor agreement provides that a faculty member have the ["First Amendment"] right to speak and write on general education questions without fear of discipline, and the employer allowed plaintiff to be dismissed from his teaching position for exercising his right to speak and write on academic matters, and therefore the employer has violated plaintiff's contractual right to speak and write on educational questions.

AS AND FOR A FIFTH CAUSE OF ACTION
Pendent State Claim

71. Plaintiff repeats and realleges the allegations contained in paragraphs numbered 1 through 42 inclusive of this complaint.

72. Plaintiff is neither a public official, a public figure, nor has he thrust himself into the vortex of public affairs.

73. Plaintiff has an excellent reputation for integrity, character and personality in the legal community, and has an outstanding reputation as a law teacher, and is one of the most popular and respected teachers at the university. (Exs "B" & "C".)

74. Plaintiff's classroom evaluation by his College Dean and departmental chairman have consistently been appraised as "Throughly Professional." (Exhibit "J" annexed hereto.)

75. Since his admission to practice law in 1956, plaintiff has never been reprimanded or admonished by any federal or state judge, by any federal or state court, by any bar

association, or by any learned, professional or legal organization of which he is a member.

76. Plaintiff had never - at any time - been informed by anyone at the university of any "character" or "personality" defects during his period of employment with the university, nor has he ever been informed that he failed to assist in the achievement of the university objectives, and plaintiff had a certain expectation of continued employment. (Exhibits "K" and "L".)

77. Each and every word published and/or ratified by the defendants which stigmatized plaintiff's character and personality is totally and maliciously false, in each and every respect.

78. These defamatory words were composed, published and circulated by defendant MacNamara with the approval of defendant

Ruggieri, and upon information and belief, acquiesced in by defendants Alexion and Robusto, with the malicious intent of denying plaintiff his gainful employment in order to obtain a personal advantage for defendant MacNamara in her own application for permanent employment status at a time these defendants knew that defendant MacNamara's qualifications, as measured against the objective elements for tenure, were secondary to that of plaintiff.

79. Defendant Margaret S. MacNamara, as an attorney at law admitted to practice in New York State, knew, or should have known, that the words she composed and published were intended to convery the meaning that plaintiff, a law teacher, and attorney at law, had bad character or undesirable character and personality traits and was

therefore unfit to practice or teach law.

80. These defendants made or acquiesced in such statements knowing that they were utterly false, and that there was not even a reasonable basis for believing that any of these statements were true, and these statements were made with actual malice towards plaintiff as a wholly groundless attack on plaintiff's character and personality.

81. In publishing the defamatory matter as quoted above under paragraph 39., page [21a], the defendants acted in a grossly irresponsible manner without due consideration for the standards of ascertaining and disseminating the truth reasonably and ordinarily followed by responsible parties, and more particularly defendant MacNamara as an attorney at law, and the other

defendants as members of an academic community.

82. Defendants intentionally and maliciously sought to disparage and destory plaintiff's excellent reputation as an attorney at law and law teacher, a reputation peculiarly essential to plaintiff in the practice and teaching of his profession. (Annexed hereto as Exhibit "C" is a copy of the student newspaper dated April 11, 1979 showing the esteem in which plaintiff was held in the academic community.)

83. On December 11, 1980 in a memorandum composed, published and signed by defendant Catherine J. Ruggieri, and typed by Mrs. V. Boke, addressed to plaintiff, with a copy distributed to defendants Margaret S. MacNamara and C. Carl Robusto, the college tenure committee consisting of defendants

Donnelly, Hendrick, Woods and Szabo, ratified, condoned and approved the defamatory statements contained in the letter to plaintiff published on October 24, 1980. (Exhibit "F" annexed.)

84. In ratifying, condoning and approving this defamatory matter concerning plaintiff's character and personality, these defendants acted in a grossly irresponsible manner without due consideration for the standards of ascertaining and disseminating the truth as reasonably and ordinarily followed by responsible parties, particularly these defendants as members of an academic community who knew, or upon reasonable inquiry should have known, that such statements were utterly false, contrived and pretextual.

85. As a consequence of the falsehoods and defamatory statements published regarding plaintiff's character and personality, plaintiff suffered shock and endured mental anguish

resulting in plaintiff's temporary incapacity in teaching his scheduled classes at the defendant college, and caused plaintiff to seek psychotherapy for which plaintiff incurred monetary damages in the sum of one hundred and forty-seven ($147.00) dollars.

86. As a result of defendants' malice and gross irresponsibility plaintiff suffered mortification, humiliation, shame and loss of professional standing and esteem of his students, peers, and in the communities in which plaintiff has an excellent reputation for good character and personality and dedicated community service. (Exhibit "M" annexed.)

87. These utter falsehoods, motivated by spite, ill will and actual malice towards plaintiff, were meant and intended to convey that plaintiff is unfit by reason of defective character and personality to

practice law, or teach law, in his licensed profession, and if these wholly false and groundless statements regarding plaintiff's character and personality are permitted to stand on the record, plaintiff will be irreparably damaged in his good name and excellent legal reputation, since no employer or educational institution will hire an attorney at law or law teacher with character and personality defects, and plaintiff can only vindicate his good name and reputation after a trial on the merits. Plaintiff has succeeded by documentary and other evidence to completely refute the charge against him that he failed to assist in achieving the objectives of St. Vincent's College and St. John's University, but plaintiff's diligent efforts to ascertain the nature of the attack on his "character" and "personality" has been met with complete

silence by those who participated in composing, publishing and making such charges. (Exhibit "N" annexed.)

Plaintiff Debarred From Job Market

88. After plaintiff's employment was effectively terminated, plaintiff sought other full time teaching jobs, and during May 1981 plaintiff succeeded in obtaining another full time taching position as Assistant Professor of Law at another college of a university in New York City. (Exhibits "O", "P" and "Q" annexed.)

89. Pursuant to prevailing college practices, plaintiff was required to furnish as academic references the name of his then college dean and departmental chairperson, and plaintiff furnished the names of Catherine J. Ruggieri and Margaret S. MacNamara as dean and chairperson respectively, but, within days plaintiff received

a telephone call from his new departmental chairman withdrawing his appointment as Assistant Professor of Law.

90. The maliciousness, spite and ill will expressed by these defendants towards plaintiff has not only resulted in plaintiff's unjustifiably losing his teaching position with the defendant college, but now the acts of these defendants has also resulted in his foreclosure from seeking other full time teaching opportunities. (Plaintiff began part-time college teaching in 1959 and has been teaching part-time and full-time at the college level for over twenty (20) years.)

91. Plaintiff has been so egregiously defamed and stigmatized by these wholly false and malicious statements that plaintiff has been precluded and debarred from the job

market, and plaintiff seeks compensatory damages in the sum of two million ($2,000,000.) dollars.

92. These totally false, malicious and utterly fabricated statements made and/or ratified by these defendants concerning plaintiff were motivated by actual malice, spite and ill will towards plaintiff and were written, published and thereafter ratified by the defendants, and such action on the part of these defendants has resulted in plaintiff being shunned, ostracized, and insulated from his professional and other colleagues and being excluded from college affairs and the academic community, and plaintiff has been isolated from his peer groups.

93. Each of the defendants personally knew, or should have known, that these statements regarding plaintiff were false, and that there was no reasonable basis for

believing that plaintiff had bad character or personality, and these statements were made in a grossly irresponsible manner without due regard for the standards of truth or in ascertaining the truth, and with the wrongful and malicious intent to injure plaintiff in his professional reputation, and to inflict emotional anguish upon plaintiff, and to expose him to shame, humiliation, loss of esteem, and by reason thereof plaintiff has suffered great pain and mental anguish, and has been irreparably injured in his profession and professional standing, and these defendants have precluded plaintiff from the job market and from seeking other full time teaching opportunities, and plaintiff can rid himself of the stigma and blemish only by a full trial before a jury, and by reason of the malicious acts, false words, and conduct of these defendants,

plaintiff seeks exemplary damages in the sum of ten million ($10,000,000.) dollars.

WHEREFORE, plaintiff prays that this Court grant judgment to plaintiff and against these defendants as follows:

1 - Reinstatement to his former, or substantially similar, teaching position, with retroactive pay to September 1, 1982, plus interest.

2 - Apportionment of liability as between the employer and the union for, respectively, the wrongful discharge of plaintiff by the employer and for the union's breach of its duty of fair representation.

3 - That the employer be directed to comply with the provisions of the collective bargaining agreement and inform plaintiff of the precise reasons and basis for the charge

of bad character and personality.

4 - Judgment against the employer awarding plaintiff the sum of $147.00 in special damages.

5 - Judgment against the employer for compensatory and actual damages as such damages are currently defined under the law of libel in the sum of $2,000,000.

6 - Judgment against the employer for exemplary damages in the sum of $10,000,000.

7 - Judgment awarding plaintiff costs and disbursements of this action, including counsel fees, and for such other and further relief as to this Court may seem just and proper.

DAVID KAPLAN
Attorney for Plaintiff

By: /s/ David Kaplan
David Kaplan
Attorney at Law
67-23 198th Street
Fresh Meadows, N.Y.
11365
Telephone: (212)454-9411

Dated: State of New York
County of Queens

May 10, 1983

Exhibit "A" Annexed to Proposed Amended Complaint

St. John's University
GRAND CENTRAL AND UTOPIA PARKWAYS
JAMAICA, NEW YORK 11439

May 13, 1981

ST. VINCENT'S COLLEGE

To Whom This May Concern:

I was Dean of the St. Vincent's College, St. John's University from 1970 to the end of the spring semester of 1980.

Professor David Kaplan commenced his teaching duties with the fall term of 1976. I have personally observed his teaching skills in the classroom and have evaluated his performance to be thoroughly professional in every respect. He is well respected by the students as well as members of the faculty. Professor Kaplan's character and integrity are beyond reproach. He has

performed well beyond the required normal bounds, services for the institution and the community. He is sincerely dedicated to his students.

I commend him as a teacher whose personality and classroom demeanor will prove a valuable asset to any educational institution.

/s/ George W. Maxey
George W. Maxey

Exhibit "A"

Exhibit "B" Annexed to Proposed Amended Complaint

Dear Professor Kaplan,

Thank you very much for teaching me and for being the best professor that I've had in my 4 years at St. Johns! I'll miss you alot! Thanks again and have a happy holiday!

EXHIBIT "B"

Exhibit "C" Annexed to Proposed Amended Complaint

"THE TORCH"

April 11, 1979

PROFILE

"Kaplan: still learning"
By Mark Michaels

For some people, education ends with commencement ceremonies after four years of college. For Professor David Kaplan of St. Vincent's College, education is a lifetime experience, whether it be on the judges' bench or in the classroom where he "learns from my best teachers, the students."

Kaplan's formal education includes a B.S. and J.D. (Juris Doctor) from New York University and an M.S. from Stevens Institute of Technology. Kaplan feels that the combination of legal skill and engineering provided the background which enabled him

in becoming General Counsel and Corporate Secretary of a steel corporation. This background also made Kaplan the logical choice to teach corporate law next spring to students in the new Legal Assistant program in St. Vincent's.

Kaplan also teaches collective bargaining and labor arbitration in addition to his undergraduate business law classes.

Also on the list of Kaplan's credits are two and one-half years of service as Impartial Arbitrator for Blue Cross of New Jersey, Independent Hearing Officer for the New York State Department of Civil Service, and the Civil Service Employees Association. Kaplan was also a "fact finder" for the Federal Aviation Administration and the Air Traffic Controllers Association.

What makes a successful lawyer venture into teaching? "I have an empathy for the

students. I also learn a great deal from them."

Kaplan feels that the duty of educators is to familiarize students with practical knowledge so that they can become more informed citizens. "I feel that St. Vincent's has an advantage here because they offer 'today' type of courses. Naturally students will be more enthusiastic about that." Kaplan also enjoys the motivation evident in St. Vincent's. "I like St. Vincent's because many students have a genuine interest in achieving educational objectives."

Kaplan's empathy for students doesn't cease after class. He is a fervent supporter of the Academic Fairness Committee for which he drafted the rules. He believes that in cases where a teacher issues a grade

without a firm basis, there should be "an administrative tribunal to give the student a full hearing."

Empathy can also help in the courtroom. "It's what the jury looks for when you address them. They can sense a person who is artificial, just like students can sense a teacher who doesn't care."

Kaplan noted that St. John's prepares students for admission to some of the most prestigious law schools. As of now, eight of his former students are attending St. John's Law School.

Kaplan believes the faculty should assist the undergraduates more and will often spend a couple of hours counseling students. He feels this would help students in career objective.

Kaplan still practices law. He serves as

Arbitrator in the Small Claims Court of Queens County. Kaplan is also a member of the Queens County Bar Association Speakers Bureau and recently addressed a pre-retirement group on the subject of estate planning.

Kaplan stays in touch with his profession by spending a minimum of 20 hours a week reading recent developments in the law. He is also in the process of editing several hundred of his labor arbitration opinions for publication. He has had over a half dozen published to date.

"The trouble with lawyers today is laziness," mused Kaplan. "Law is reading and writing. This past Sunday I was in the library till 10 speaking to the librarian about recent publications that were available."

Kaplan suppements his reading with some

schooling. He recently completed a course in vocabulary enrichment and is presently auditing a tax course. This summer Kaplan will attend a two-week law seminar at Harvard.

When asked to sum up the problem with the American court system, Kaplan said, "You should not have to sacrifice integrity for expediency, but unfortunately, it happens."

As for pre-legal training, Kaplan said that English is the most important course for law school, followed by history, accounting ("The language of business," noted Kaplan.) and logic.

"Most Important to an individual for self-fulfillment," said Kaplan "is a perceived good image of oneself. A student may succeed if others don't believe in him, but he will never succeed if he doesn't believe in himself."

"THE TORCH"
April 11, 1979



Dr. David Kaplan

Exhibit "C"

Exhibit "D" Annexed to Proposed Amended Complaint

CIVIL COURT OF THE CITY OF NEW YORK
111 CENTRE STREET
New York, N. Y. 10013

June 5, 1981

David M. Kaplan, Esq.
67-23 198th Street
Flushing, New York 11365

Dear Mr. Kaplan:

Your letter together with its accompanying proposals for use in the Arbitration Program has been read with great interest. You are to be commended for your efforts and good wishes and I thank you.

A copy of your letter and proposals are being sent to every Arbitration Commissioner in the City for their views and comments. I am also sending copies to the various Judges and others at the Office of

Court Administration in charge of and connected with the Arbitration Program. This is a state-wide program and I think it only proper that your proposals are made known to all.

The collecting and assimilation of the comments of all these individuals may take some time, but you may rely on my letting you know just as soon as some concensus has been had and action taken on your proposals.

Very truly yours,

/s/ Francis X. Smith, JSC
Deputy City Administrative Judge
Civil Branch

FXS:IA:lb
cc: Hon. E. Leo Mionas
Steve Gross
Michael McEneney
Bill Bulman
Ron Stout

Exhibit "D"

Exhibit "E" Annexed to Proposed Amended Complaint

St. John's University
New York

M E M O R A N D U M

To Dr. John C. Alexion, Vice President
for Business & Career-Oriented Programs

From Asst. Prof. D. Kaplan
Div. of Administration & Economics

Subject Chairman Vacancy for Division of
Administration and Economics,
St. Vincent's College

Date March 25, 1980

In response to your memodandum dated March 19, 1980, subject as above, I respectfully decline to be considered for the instant position.

/s/ D. Kaplan
David Kaplan, B.S.,M.S.I.E.
J.D.
Asst. Prof. of Business Law

DK:aj

cc: Acting Dean Catherine Ruggieri, St. Vincent's College
Asst. Prof. G. T. O'Boyle

Exhibit "F" Annexed to Proposed Amended Complaint

St. John's University
New York

M E M O R A N D U M

To Professor David M. Kaplan

From Catherine J. Ruggieri

Subject Action of St. Vincent's College Personnel Committee Date Dec. 11, 1980

I am sorry to inform you that the St. Vincent's College Personnel Committee, at its meeting on December 10, 1980, did not sustain your appeal from the action of your division's Personnel and Budget Committee which denied you tenure. The vote of the St. Vincent's College Personnel Committee was 1-4-0.

In addition, I am sorry to inform you that the St. Vincent's College Personnel Committee, at its meeting on December 10, 1980, did not sutain your appeal from the

action of your division's Personnel and Budget Committee which denied your promotion to the rank of Associate Professor, also by a vote of 1-4-0.

The St. Vincent's College Personnel Committee based both of the foregoing decisions upon the reasons of your division's Personnel and Budget Committee as stated in the Acting Chairman's letter to you dated October 24, 1980. The St. Vincent's College Personnel Committee did not find persuasive the arguments advanced in support of your appeals.

According to the provisions of Articles 25.6 and 24.6 of the University Statutes, there are no further appeals of these decisions.

Regretfully, therefore, I must advise you that your faculty status at the University will terminate at the end of the 1981-1982

academic year. Your contract for the 1981-1982 academic year will be a terminal one.

/s/ Catherine J. Ruggieri
Acting Dean
St. Vincent's College

CJR:vb

cc: Dr. C. Carl Robusto

cc: Prof. M. MacNamara

Exhibit "F"

Exhibit "G" Annexed to Proposed Amended Complaint

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
St. John's University Chapter
Grand Central At Utopia Parkways
Jamaica, New York 11432

January 9, 1981

Prof. David Kaplan
St. Vincent's College
Jamaica, New York 11439

Dear Prof. Kaplan,

This is to confirm that I have received your memorandum of December 19, 1980 and have submitted same to our attorney, Mr. Henry Berger, for his advise and direction. I shall contact you as soon as I receive word.

Sincerely,

/s/ Frederick E. Hueppe

Dr. Frederick E. Hueppe
President, AAUP Chapter.

FEH/cmck

Exhibit "G"

Exhibit "H" Annexed to Proposed Amended Complaint

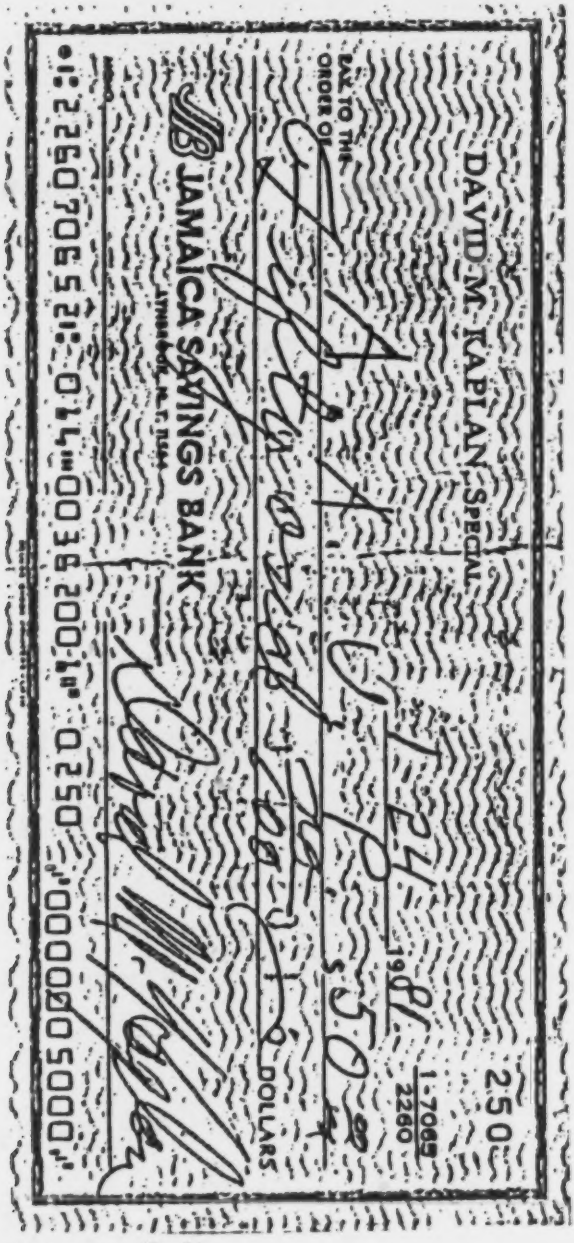


Exhibit "H"

Exhibit "H[1]" Annexed to Proposed Amended Complaint

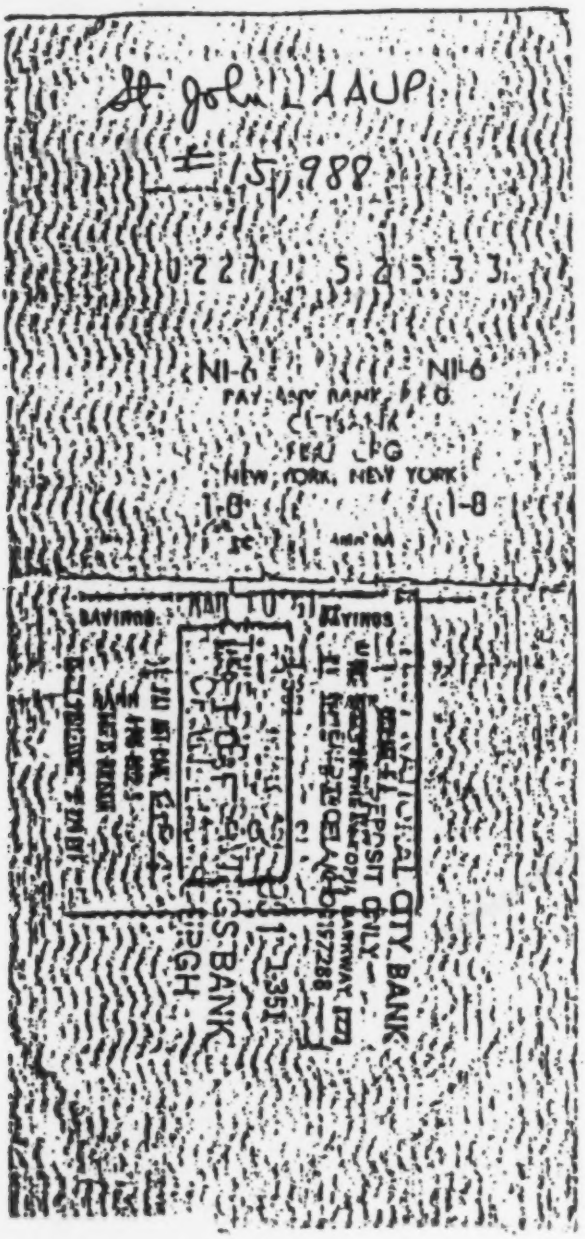


Exhibit "H[1]"

BEST AVAILABLE COPY

Exhibit "I" Annexed to Proposed Amended Complaint



Exhibit "I"

Exhibit "I[1]" Annexed to Proposed Amended Complaint

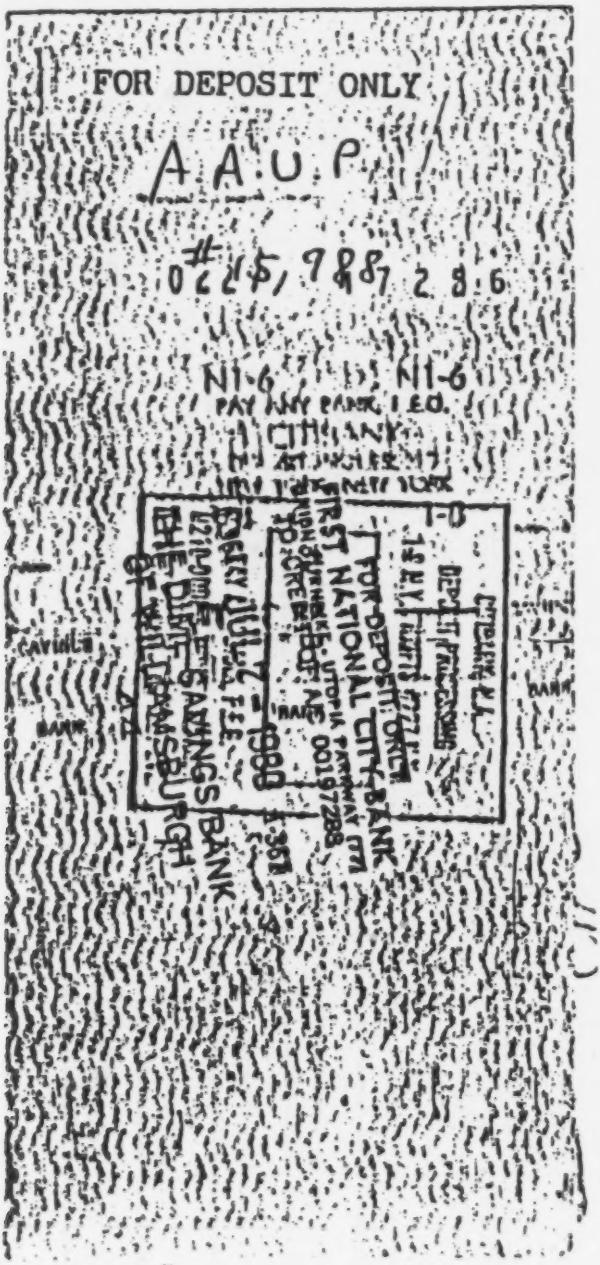


Exhibit "I[1]"

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106a

Exhibit "J" Annexed to Proposed Amended Complaint

ST. VINCENT'S COLLEGE

CLASS VISITATION

Date of Visit Nov. 3/77

Teacher D. KAPLAN Division ADM & ECO. Course BUS. LAW 1001 B

Day THUR Time 2:20-3:4

I. PERSONAL QUALITIES

1. Appearance PROFESSIONAL
2. Attitude Toward Class PROFESSIONAL
3. Voice and Expression HIGHLY EFFECTIVE
4. Mannerisms NONE OBSERVED
5. Courtesy/Tact EXEMPLARY
6. Poise "

II. INSTRUCTIONAL EFFECTIVENESS

1. Demonstrated Knowledge of Subject BOTH AS A LAWYER & TEACHER
2. Organization of Class Presentation FROM THE OUTSET OF CLASS

Exhibit continued on next page

3. Adherence to Syllabus ✓

4. Communication Skills PROFESSIONAL - ADDRESSES STUDENTS BY NAME.

5. Use of A/V or Illustrative Material

6. Student Interest ATTENTIVE - INQUISITIVE -

7. Ability to Question Students WELL DONE

8. Ability to Answer Questions WELL DONE

9. Variety of Instructional Techniques

10. Session's Objectives Achieved YES

III. STUDENT-TEACHER RAPPORT

1. Sensitive to Mood of Class OBVIOUSLY GOOD RAPPORT

2. Fairness in Dealing with Students WITHOUT EXCEPTION

3. Class Control EXCELLENT

IV. VISITOR'S COMMENTS

D. Kaplan
Signature - Faculty Member

Signature - Visitor

107a

Exhibit "J"

BEST AVAILABLE COPY

Exhibit "K" Annexed to Proposed Amended Complaint

St. John's University
New York

Memorandum

To: David Kaplan From C. Carl Robusto
Chairman,
University Personnel
Committee

Personnel Action

Date January 30, 1980

I am happy to inform you that the University Personnel Committee at its meeting on January 30, 1980 approved the recommendation of your College/School Personnel Committee that you be reappointed for the 1980-81 academic year.

This recommendation will be submitted to the Board of Trustees for final consideration and action.

/s/ C Carl Robusto
C. Carl Robusto

CCR:mw

cc: Dean George W. Maxey
Prof. Gerard O'Boyle

Exhibit "K"

Exhibit "L" Annexed to Proposed Amended Complaint

St. John's University
GRAND CENTRAL AND UTOPIA PARKWAYS
JAMAICA, NEW YORK 11439

May 19, 1980

Professor David Kaplan
67-23 198th Street
Fresh Meadows, N.Y. 11365

Dear Professor Kaplan:

We are pleased to confirm that your contract has been renewed for the 1980-81 academic year.

Since salaries of all faculty members are the subject of collective bargaining, your salary increase during this period of renewal cannot be specified at this time.

Sincerely,

/s/ Catherine J. Ruggieri
Catherine J. Ruggieri
Acting Dean
St. Vincent's College

CJR:vb

Exhibit "L"

Exhibit "M" Annexed to Proposed Amended Complaint

Professor David Kaplan George W. Maxey
March 1, 1979

Commendation

The commendation referred to the Very Reverend President by Arlene Gibbons and Melba Hamilton of the Catholic Charities/ Senior Assistance Center has been referred to me and I congratulate you.

Subject letter will be placed in your personnel file.

Congratulations and best wishes.

George W. Maxey, Dean
St. Vincent's College

GWM:cml

Exhibit "M"

Exhibit "N" Annexed to Proposed Amended Complaint

To Professor David Kaplan From George W. Maxey

Subject Court Decision August 22, 1979

Thank you for the information you sent to me.

The 1979-1981 Undergraduate Bulletin describes specific degree requirements.

In addition, the State Education Department has a long standing requirement that a student's degree program is based on the bulletin in effect at time of student's entry.

Should a degree program change said student must be permitted to complete original requirements.

Therefore revisions apply only to those students who enter after the effective date of the revisions.

I appreciate the information you furnished as well as your continued interest in "covering our flank".

Thank you kindly.

/s/ George W. Maxey
Dean
St. Vincent's College

GWM:cml

cc: Prof. O'Boyle

Exhibit "N"

Exhibit "O" Annexed to Proposed Amended Complaint

David Kaplan, Esq.
67-23 198th Street
Flushing, New York 11365

Dear David,

I am pleased to advise you that you have been selected for an interview for a full time position in the rank of Assistant Professor of Law for the coming academic year September 1, 1981 to August 31, 1982.

Interviews will be held on Thursday, April 30th between 12 and 2. Please call our department secretary [intentionally left blank] to confirm an appointment.

Sincerely,

[Intentionally left blank]

Chairman, Department of Law

Exhibit "O"

Exhibit "P" Annexed to Proposed Amended Complaint

Shirley and David Kaplan
67-23 198th Street
Fresh Meadows, New York 11365

[Address intentionally omitted in original]

Please accept my very sincere thanks for your good wishes.

I should like to write a personal note to all members of your Faculty Selection Committee thanking them for their support and looking forward to working with all of them in the future. May I do so? If yes, may I call [omitted] and obtain the full names of the committee.

Thank you again. I will see you, of course at your convenience on Wednesday May 13th. Incidentally, that evening I will be sitting in Small Claims Court.

Very sincerely yours,
/Initials/ DK

Exhibit "P"

BEST AVAILABLE COPY

Exhibit "Q" Annexed to Proposed Amended Complaint

NAME D. Kaplan SCHEDULE OF CLASSES FALL SPRING 1981

	MON	RM	TUES	RM	WED	RM	THURS	RM	FRI	RM
8:00-8:50										
9:10-9:25										
9:05-9:55										
10:30-10:45										
10:40-10:55										
11:00-11:50										
11:00-12:45										
11:05-11:55										
11:15-12:05										
11:20-12:35										
12:20-1:10										

Exhibit "Q"

Office-Supreme Court, U.S.
FILED
JUL 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2142

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID KAPLAN,

Petitioner,

– against –

CATHERINE J. RUGGIERI, MARGARET S. MACNAMARA, THEODORE MUZIO, GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY; ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union)

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

NON-UNION RESPONDENTS' BRIEF IN OPPOSITION

HERBERT D. SCHWARTZMAN
Counsel of Record for
Non-Union Respondents
c/o St. John's University
Jamaica, New York 11439
(212) 990-6311

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the District Court abused its discretion by refusing to allow an amendment to a complaint, where summary judgment had previously been granted to Defendants "in all respects;" the Court of Appeals affirmed the granting of defendants' motion for summary judgment, and no petition for certiorari was sought?

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Kaplan v. Long Island University, 85 Lab. Cas. (CCH) ¶10,942 (S.D.N.Y. 1978)	1
Nevada v. United States, _____U.S._____, 103 S. Ct. 2906 (1983)	4
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Other Authorities	
Moore's Federal Practice (2d ed. 1983)	2, 3
Restatement (Second) Judgments (1982)	2
Wright, Miller & Kane, *Federal Practice and Procedure* (2d ed. 1983)	2

STATEMENT OF THE CASE

Petitioner is an attorney who was a professor of business law at St. Vincent's College which is a unit of Respondent, St. John's University [6-7].* Prior to his employment at Respondent University, Petitioner's employment had been terminated by Long Island University. [*See, Kaplan v. Long Island University*, 85 Lab. Cas. (CCH) ¶10,942 (S.D.N.Y. 1978)]. In the fall of 1980, Petitioner's application for tenure at Respondent University was denied [22a-23a].

The Non-Union Respondents comprise the University, St. Vincent's College and various faculty members and administrators at the University, the majority of whom served on the two committees (comprised almost exclusively of Petitioner's faculty peers) which denied Petitioner tenure [22a-24a].

The remaining Respondents, who are separately represented, are the faculty Union and its co-presidents [21a].**

Petitioner brought an action in the United States District Court for the Eastern District of New York, challenging, *inter alia*, the denial of tenure to him (which he labelled a "wrongful discharge") and breach of the Union's duty of fair representation ["*Kaplan I*"; 20a-22a]. Jurisdiction was based primarily upon §301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185 (1976) [20a]. There was no claim of violation of Title VII or any other civil rights law.

In *Kaplan I*, Respondents moved for summary judgment with regard to all of the claims set forth in Petitioner's original complaint other than a pendent defamation claim. Those motions for summary judgment were "granted in all respects" [36a]. Petitioner then appealed to the Second Circuit which unanimously affirmed, *inter alia*, "for the reasons stated in Judge Neaher's thorough opinion" [14a]. Petitioner then unsuccessfully sought a rehearing en banc [17a-18a]. *No petition for certiorari was sought by Petitioner in Kaplan I.*

---

*Unless otherwise indicated, all references are to the Petition for Certiorari and references with a suffix "a" are to the appendix thereto.

**We have been informed that although the Union Respondents oppose the Petition, they do not intend to file a brief.

Thereafter, Petitioner moved to amend his complaint ["*Kaplan II*"; 7a]. Jurisdiction continued to be based on §301 [41a]. The District Court found the gravamen of the complaint in *Kaplan I* and the proposed amended complaint in *Kaplan II* to be the same [12a n.2]. Indeed, as is made manifest by the Petition, the principal addition to the proposed amended complaint in *Kaplan II* was a reshuffling of assertions Petitioner had previously made in an affidavit submitted by him in *Kaplan I*, regarding payments of $150 to the Union [*See e.g.*, 6 n.3, 20, 23, 26].

Accordingly, the District Court denied Petitioner's motion to amend primarily on the grounds of *res judicata* [8a-11a] and the Court of Appeals for the Second Circuit affirmed "substantially for the reasons set forth in the memorandum and order" by the District Court [2a]. It is from this decision in *Kaplan II* that Petitioner now seeks review by this Court.

ARGUMENT

THE DETERMINATION THAT PETITIONER SHOULD NOT BE GRANTED LEAVE TO AMEND HIS COMPLAINT WAS, IN ALL RESPECTS, CORRECT

As the Petition recognizes, summary judgment was granted in *Kaplan I* despite numerous assertions by Petitioner of his payments to the Union of $150 and his claim of "wrongful discharge" [*e.g.*, 6 n.3, 20-21, 23, 25-26]. Indeed, it is crystal clear from the Petition itself that, under the guise of petitioning for certiorari in *Kaplan II*, Petitioner's real attack is upon the grant of summary judgment in *Kaplan I* [6-11(4); 19-27].

It is hornbook law that:

> A summary judgment motion goes to the merits of the case, and because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata.

10 Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d*: §2712, at 584-85 (2d ed. 1983) (footnotes omitted); 6 *Moore's Federal Practice*, §56.03, at ¶56-55 (2d ed. 1983); Restatement (Second) Judgments, §19, comment g (1982).

The District Court recognized these elemental principles and held [8a; 574 F. Supp. at 633]:

> The original complaint included a claim that the union breached its duty of fair representation as a result of its handling of the grievance proceeding. Fed. R. Civ. P. 56 indicates that a "motion for summary judgment applies to the merits of a claim", *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956), "and if [granted] in favor of the defendant the judgment is in bar." 6 Moore's Federal Practice §56.03 at p. 56-55 (2d ed. 1983). Therefore, plaintiff's general claim of unfair representation has been adjudicated on the merits.[*]

Over a century ago, this Court, in *Cromwell v. County of Sac*, 94 U.S. 351 (1876), explained the doctrine of *res judicata* as follows [at 352]:

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

See also, 6 *Moore's Federal Practice*, 56.17 [52] at 56-1043 and n.1 (2d ed. 1983).

The District Court held that all of the issues sought to be raised by Petitioner in *Kaplan II* were (or, at the very least, might have

---

*Thus, Petitioner's reliance upon *Foman v. Davis*, 371 U.S. 178 (1962) is flawed in two respects. First, as the District Court noted in a footnote to its opinion [12a; 574 F. Supp. at 634 n.3]:

> *Foman* allowed an amendment which stated an alternative theory of recovery. Here plaintiff does not interpose an alternative theory of recovery but rather attempts to buttress the existing one, which has already been adjudicated.

Second, unlike *Foman*, Petitioner herein has been fully "afforded an opportunity to test his claim on the merits." [*Foman*, at 182].

been) litigated on the merits in *Kaplan I*. It stated [8a-10a; 574 F. Supp. at 633-34]:

> The doctrine of res judicata applies to prevent a cause of action from being relitigated between identical parties. When a judgment has been entered on the merits it is final as to the claim in controversy. That finality applies " 'not only as to every matter which was offered and received to sustain or defeat the claim or demand but as to any other admissible matter which *might have been offered* for that purpose.' " *Nevada v. United States*, _____U.S._____, _____, 103 S. Ct. 2906, 2918, 77 L. Ed. 2d 509 (1983) (emphasis added), *quoting Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195 (1876). In other words, the final judgment puts an end to the cause of action. *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L. Ed. 898 (1948).
>
> * * *
>
> Here, plaintiff's claim certainly "might have been offered" before. His claim concerning the extracting of money by the union is inextricably linked to the claim of unfair representation; it is not an additional fact that has subsequently occurred but one which plaintiff was capable of pleading when the original complaint was filed. Plaintiff did not bring this fact up then and is precluded from asserting it now. [Footnote omitted].

The District Court's holding that Petitioner's proposed amended complaint was barred by the doctrine of *res judicata* is in conformity with the uniform decisions of this Court which precludes a collateral attack upon the final judgment granted in *Kaplan I*. *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981); *Nevada v. United States*, _____U.S._____, 103 S. Ct. 2906 (1983); *Commissioner v. Sunnen*, 333 U.S. 592 (1948); *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

Moreover, there are no less than three additional bases for rejecting the proposed amended complaint.

First: In *Kaplan I* both the District Court [34a-35a] and the Court of Appeals [15a] held that Petitioner's tenure decision was, in the words of the Court of Appeals, "decided despite the union's action and/or inaction in handling the matter" [*id.*]. Accordingly, any payment of $150 to the Union is irrelevant to Petitioner's denial of tenure ("wrongful discharge") claim.

Second: This Court has held that in order for an employee to sustain a §301 action, he must prove two " 'inextricably interdependent' " elements *viz.*: "breach of the collective bargaining agreement" by the employer and a "breach of the union's duty of fair representation." *DelCostello v. IBT*, _____U.S._____, 103 S. Ct. 2281, 2290 (1983). Since, as noted in the preceding paragraph, in *Kaplan I* both the District Court and the Court of Appeals found no violation of §301 in connection with the denial of tenure ("wrongful discharge"), the essential element of the employer's breach is absent, and the §301 action must fail.*

Third: Assuming, *arguendo*, that Petitioner has alleged a "new claim" involving the Union's duty of fair representation, it is barred by the statute of limitations. The proposed amended complaint is dated May 10, 1983 [85a]. Whether Petitioner's claim ran from the denial of tenure, which occurred on October 24, 1980 [22a; *see Delaware State College v. Ricks*, 449 U.S. 250 (1980)], or even from the date Petitioner filed his original complaint (June 25, 1981), it is clearly beyond the six month statute of limitations. *See DelCostello v. IBT*, *supra*.

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*Accordingly, Petitioner's reliance upon *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981) is misplaced. Nowhere in the *Mitchell* case does this Court infer that an independent action for breach of a union's duty of fair representation may be brought under §301. That section, by its terms, relates only to "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations . . . ." 29 U.S.C. §185(a). In any event, the holding in *Mitchell* was superseded by this Court in *DelCostello*, 103 S. Ct. at 2291.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
SEP 14 1984
ALEXANDER L. STEVAS,
CLERK

(3)

No. 83 - 2142

IN THE

Supreme Court of the United States

October Term, 1984

DAVID KAPLAN,

Petitioner,

-against-

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY: ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union),

Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

*

PETITIONER'S REPLY

A R G U M E N T

I

For the First Time, the Employer Argues that this Court's Opinion in DelCostello v. I.B.T., infra Has Superseded this Court's Opinion in U.P.S. v. Mitchell, infra.

The employer has now asserted that an individual employee can have no independent cause of action against the union because DelCostello v. I.B.T., 103 S. Ct. 2281 (1983) has "superseded" United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). 1/

The employer contends that Section 301(a), 29 U.S.C. 185(a) of the Labor-Management Relations Act of 1947 relates only to "suits

1/ The union, on the other hand, rather than attempt to justify or even explain the reason for demanding and accepting the $150.00 for processing the employee-petitioner's wrongful discharge grievance, has elected not to submit any opposing brief to the petition. Indeed, the union has never pretended to have any real or genuine defense to the demand-for-monies allegations, and like the employer, had urged the lower courts to adopt res judicata as a bar to the proposed amended complaint. A position that is contrary to this Court's "mandate" to the lower courts in Foman v. Davis, 371 U.S. 178 (1962).

for violation of contracts between an employer and a labor organization or between any such labor organizations." and thus ignoring the unmistakable language of Smith v. Evening News Ass'n., 371 U.S. 195 (1962). In fact, Justice Brennan in DelCostello, supra, reinforced the rights of the individual employee: "It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement Smith v. Evening News Ass'n., 371 U.S. 195, 51 L.R.R.M. at 2741 (1962)." (Vaca v. Sipes, 386 U.S. 171 (1967) was an employee's action only against the union.)

A. The Issue of DelCostello's Retroactivity Was Not Mentioned By Either the District or Circuit Court, Although Fully Briefed By Both the Employer and the Union.

In any event the $100.00 check demanded

and accepted by the union is dated May 4, 1981 (104a-105a), and the original complaint in the district court was filed 51 days later on June 25, 1981. In addition, Prof. Kaplan filed his grievance protesting his wrongful dismissal on December 19, 1980 (101a), and the union waited one (1) year before the aggrieved employee was made aware that the union would not pursue his wrongful discharge grievance to arbitration. Robesky v. Qantas Airways, 573 F.2d 1082, 1089-90, 98 L.R.R.M. 2090 (9th Cir. 1978). In Robesky although the claim against the employer was dismissed, the Ninth Circuit vacated the judgment in favor of the union in these words: (98 L.R.R.M. at 2097)

> "...[A] trier of fact could reasonably find that the Union's failure to disclose to [the employee] that her grievance would not be submitted to arbitration was without rational basis or was reckless and extremely prejudicial..."

II

Act of Omission as Constituting A Union's Breach of Its Duty of Fair Representation

The petition in this Court was docketed June 28, 1984, and on July 19, 1984, the Second Circuit issued its opinion in N.L.R.B. v. Teamsters, Local 282, 116 L.R.R.M. 3292 (2d Cir. 1984).

The issue before the Second Circuit Panel was whether or not an "act of omission" may be sufficient to constitute a fair representation breach, twice citing Robesky v. Qantas Airways, 573 F.2d 1082, 1089-90, 98 L.R.R.M. 2090 (9th Cir. 1978), and cited on page 9. of the petition now before this Court. Robesky, supra, dealt with the delay by the union in informing an employee regarding the status of a discharge grievance, and Teamsters, Local 282, supra, dealt with the failure by the union in informing all of the affected employees

of the contents of an arbitration award. (The Second Circuit Panel also answered the question left open in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963) by holding that a union may be found to have engaged in an unfair labor practice by breaching its statutory duty of fair representation, within the meaning of 29 U.S.C. 158(b)(1)(A) (1982).)

The Second Circuit Panel in Teamsters, Local 282, supra, concurred with other circuits that have considered similar issues: (116 L.R.R.M. at 3297)

> "We agree with other courts which have held that arbitrary conduct amounting to a breach is not limited to intentional conduct by union officials but may include acts of omission which, while not calculated

to harm union members, "may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.' Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978); Warehouse Union, Local 860, I.B.T., v. N.L.R.B., 652 F.2d 1022, 1025 (D.C. Cir. 1981)...In addition, we have noted that the fiduciary duty which a union owes to its members requiring it to inform them of their obligations so that they may take whatever steps are necessary to protect their interests in their job. N.L.R.B. v. Local 182, I.B.T., 401 F.2d 509, 510 (2d Cir. 1968), citing, N.L.R.B. v. Hotel, Motel &

Club Employees' Union, Local 568,

320 F.2d 254, 258 (3rd Cir. 1963)."

Of greater significance however is footnote 13. at 116 L.R.R.M. at 3297 in which the Second Circuit Panel held, contrary to the district court's opinion in the case now at bar (30a), that a showing of "bad faith" is not the sine qua non to a finding of a union's breach. "We do not agree" said the Second Circuit, "that a showing of bad faith is a prerequisite for establishing the existence of a breach. While it certainly is a sufficient condition, it is not a necessary one. Jones v. T.W.A. 495 F.2d 790, 798 (2d Cir. 1974)."

While the district court on the petition now before this Court continued to refer to a "teaching schedule" grievance, a 1981 issue - wholly and totally unrelated - to Prof. Kaplan's wrongful discharge

grievance (30a-31a), the said district court, citing a pre-Vaca v. Sipes decision (Balowski v. U.A.W. 372 F.2d 829 (6th Cir. 1967) held that "...as a threshold matter, some ill motive or arbitrary action on the part of the Union to support his claim." must be shown before a union may be found guilty of a fair representation breach. The Second Circuit then affirmed. (14a-16a). Now, however, in N.L.R.B. v. Teamsters Local 282, supra, the Second Circuit holds that "an act of omission" breaches a union's duty of fair representation. (Petitioner respectfully urges this Court to consider that the union in the instant case committed two (2) acts of unfair representation: One, it demanded $150.00 as a precondition of processing

petitioner's wrongful discharge grievance, and, two, it waited one (1) year before putting petitioner on notice that it would not pursue his wrongful discharge grievance to arbitration.)

III

Under Bowen v. U.S. Postal Service, infra, This Court Has Now Placed Primary Liability for Lost Wages On The Union

The reason for the focus on the union's liability is this Court's recent opinion in Bowen v. U.S. Postal Service, 103 S. Ct. 588, 112 L.R.R.M. 2281 (1983), but, since the union has waived its right to file an opposing brief, the employer now seeks to assert its opposition to petitioner's claim against the union for lost wages., footnote, at page 5. of employer's opposing brief. 2/

2/ This Court in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) held that the employer, however, must remain a party to the action since it is the employer who percipitated the entire controversy by its wrongful discharge, but more important, only the employer can offer the wrongfully discharged employee reinstatement.

While Bowen and U.P.S., supra, modified Hines, supra, with respect to the apportionment of damages by placing primary liability for lost wages on the union because it caused the grievance procedure to "malfunction", the principal impact of DelCostello was to adopt the six month statute of limitations for Section 301/breach of fair representation suits, as contained in Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. §160(b). Moreover, in DelCostello Justice Brennan cited with approval that portion of the concurring opinion by Justice Stevens in U.P.S. v. Mitchell that even if there was an arbitration proceeding, (there was none in the case at bar), that such proceeding "...could not resolve the employee's claim against the union." 451 U.S. at 73, 113 L.R.R.M. at 2742-3.

Accordingly, U.P.S. v. Mitchell was

not "superseded" by DelCostello as asserted by the employer's opposing brief. In any event, neither the district court nor the Second Circuit Panel mentioned DelCostello in any of its opinions, although it was vigorously urged to do so by both the employer and the union.

The continued viability of U.P.S. v. Mitchell is further demonstrated by at least three subsequent decisions, one by the Fifth Circuit and by two district court opinions., viz., that a union can be liable for a breach of its duty of fair representation without a simultaneous or a prior adjudication of the employer's responsibility. Del Casal v. Eastern Air Lines, 634 F.2d 295 (5th Cir. 1981); Dutrisac v. Caterpillar Tractor Co., 511 F.Supp. 719 (N.D. Cal. 1981); Long v. I.U.E.W., 544 F. Supp. 1375 (E.D. Pa. 1982).

Accordingly, apart from failing to "heed" this Court's "mandate" in Foman v. Davis, supra, the lower courts failed to consider the recent impact of U.P.S. v. Mitchell, supra, with respect to the employee's independent cause of action as against the union. (Concurring opinion of Justice Stevens in Mitchell, 451 U.S. 56, 107 L.R.R.M. at 2007 (1981). However, more significant here is that even if the employer is found not to have breached the collective bargaining agreement, the union is nevertheless primarily liable for lost wages because it caused a "malfunctioning" of the grievance procedure. Bowen v. U.S. Postal Service, supra.

Finally, there is no case, to this petitioner's knowledge, that has allowed an employer to stigmatize a wrongfully

discharged employee with a charge of "bad character" and thereafter foreclose that employee from obtaining another definite teaching appointment. (114a-115a).

Conclusion

The employer's opposing brief is both conceptually, and legally, in error in asserting that the employee-petitioner has no independent cause of action against the union, and the union has elected not to submit any opposing brief. For the reasons enumerated in the Petition at pages (iii) to (viii), and as further amplified in this reply brief, it is most respectfully urged that the employee's Petition be granted or that this Court summarily reverse on the record.

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Dated: September 10, 1984